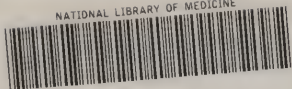


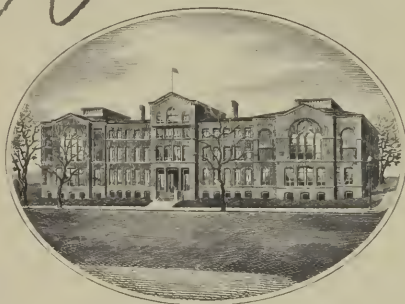
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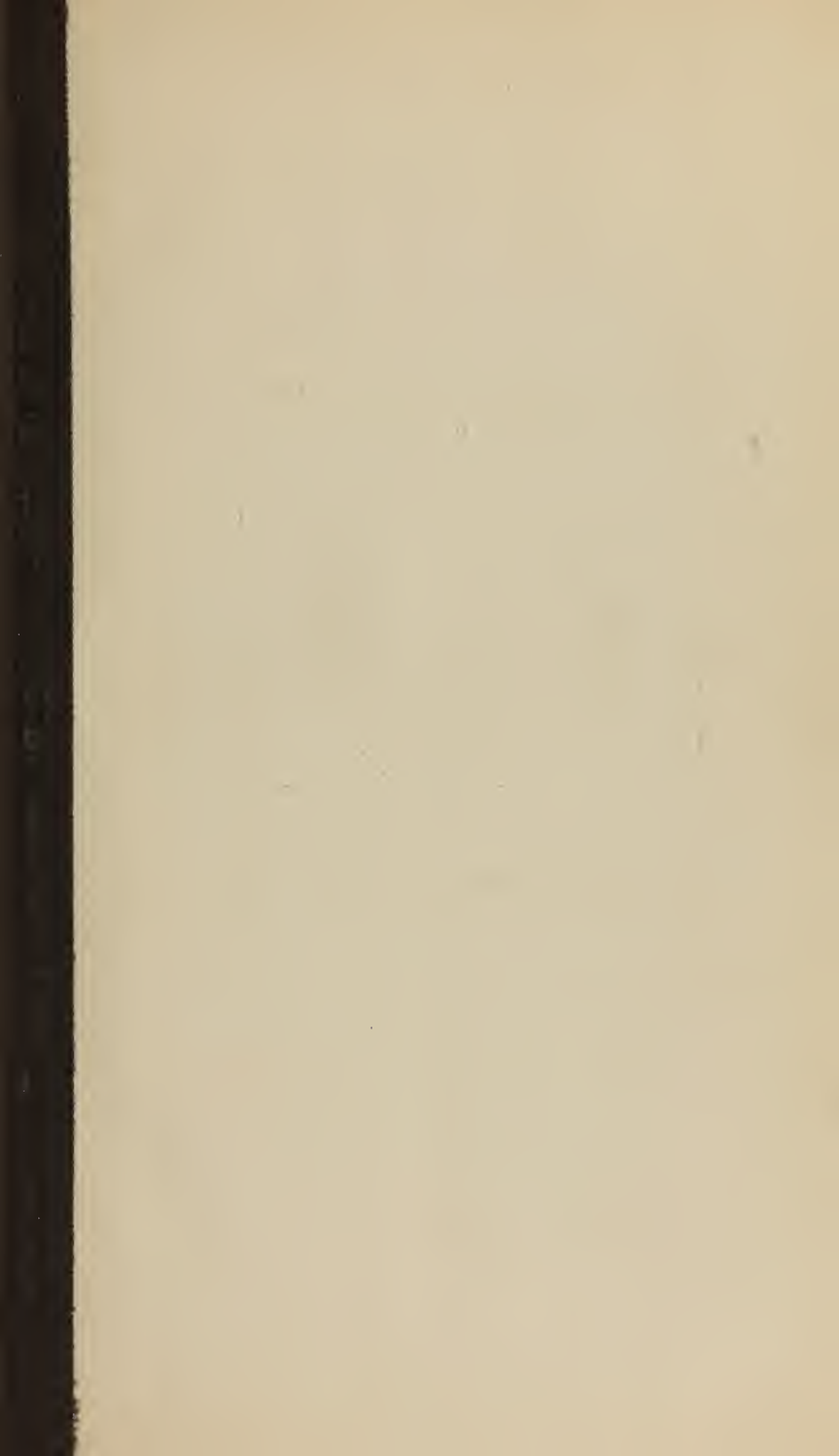
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COMMENTARIES
ON THE
LUNACY LAWS OF NEW YORK,

AND ON THE
JUDICIAL ASPECTS OF INSANITY

AT
COMMON LAW AND IN EQUITY,
INCLUDING
PROCEDURE,
AS EXPOUNDED IN ENGLAND AND THE UNITED STATES.

BY
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NEW YORK, AND AUTHOR OF THE "JURIS-
PRUDENCE OF MEDICINE."

Et juris nodos, et ænigmata solvere.

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PREFACE.

The object of the following work is to bring into one practical treatise the entire field of insanity in its judicial aspects, to unfold the reasons underlying these adjudications, and to expound the rules of procedure by which, whether at common law or in equity, the status of lunacy may be inquired into, established, or traversed in the forum of Municipal Law. Insanity is a subject which touches our civil rights at so many different points, that it may be said to have a place in every problem involving human responsibility. Hence we find it treated at common law and in equity; in works upon *Medical Jurisprudence*, *Contracts*, *Agency*, *Partnership*, *Torts*, *Life Insurance*, *Crimes* and *Construction of Wills*. It begins with man in the cradle, and follows him to the grave. It is often part of his physical heritage, and may become a qualifying element in all his civil acts. To collect and embody in one treatise the principles of law by which courts govern their adjudications in questions of mental incapacity, and to expound through commentaries both the philosophy of these decisions and the rules of procedure under which they are rendered, is the object aimed at in this manual of Lunacy practice.

The recent establishment of a department of Lunacy supervision by the State of New York, has turned public attention to it as a source for consultation, in the application of our Statute and Common Law to the legal relations of the insane. And an experience of several years, as the

first State Commissioner in Lunacy appointed under this new order of things, taken in connection with the many legal questions which I have been called upon to examine, have led me to the belief that a service might be rendered to the jurisprudence of insanity in this, and other States, by the preparation of the accompanying work. These commentaries are largely compiled from cases that have been submitted to me for official determination. For although the Commissioner in Lunacy exercises no judicial functions outside of his visitatorial powers over asylums, yet it has devolved upon him to impart legal advice both to professional practitioners and to public officers, in matters affecting either private rights or conflicts of jurisdiction, where, from the nature of the personal interests at stake, or the character of the jurisdiction involved, it was undesirable to bring them into the forum of remedial justice. These interpretations are based upon living statutes and established principles, and rest, therefore, in analogies drawn from judicial decisions both in law and in equity. They are simply opinions upon the practical applications of our Municipal Law to the subjects under consideration.

It cannot be necessary to demonstrate why, under any system of jurisprudence, the department of Lunacy must always be one dealing with problems of an exceptionally perplexing character. Nor, again, that in every age, it must reflect to a high degree the prevailing ideas entertained by the medical philosophy of that day touching those mysterious physical conditions affecting both the intellect and the moral affections. Hence the Common Law, as applied to the insane in the days of COKE and HALE, was not, as a system of principles, wholly re-affirmed in the decisions of their successors, ERSKINE, ELDON or HARDWICKE. When great medical luminaries like MEAD or SYDENHAM believed in the witchery of stellar influences upon the mind, or in the influence of draperies of a particular color upon the treatment of disease, or upon this or that occult

and profane agency as a physical disturber, it was natural that the authority whence the dogma sprang should have given it a standing both in Law, as well as in Medicine. But progress was nevertheless made, for here as elsewhere,

“Through the ages, one increasing purpose runs,
And the thoughts of men are widened, with the process
of the suns.”

Even in his day Lord HARDWICKE condemned the use of the word Lunatic as erroneous; and farther back still the earliest English writs in Lunacy mentioned by FITZHERBERT, had acknowledged a substantial distinction between idiots and the insane. This distinction of immemorial age, represents the highest and most advanced medical knowledge of to-day, and is re-affirmed in our own Revised Statutes. Since ERSKINE made his great plea in Hadfield's case, or Dr. HASLAM announced with apparent novelty to all that there was no perfect mind in the universe except that of Deity, judicial opinions have unquestionably followed more closely than ever the progress of medical science in its interpretations of the relations of body to mind. And despite exhibitions of flagrant ignorance in self-styled experts retained under the same contract as attorneys to secure a verdict for their clients; despite the confusing opinions which often disfigure the scientific value of such testimony because of its inherent crudity, there is still a growing feeling that it is a form of evidence which, in the nature of things, cannot be dispensed with, and which, therefore, needs to be fostered by legislation, or rules of procedure, in such a way as to exclude the ignorant and pretentious, while at the same time giving to the learned and deserving a higher standing in judicature than has yet been accorded them. Not until this be done can we expect to see justice informed by science through the agency of skilled *assessors*, (not party witnesses), though summoned by legal fiction as experts *quoad hoc*.

The State of New York in its common-law and equity practice, up to the adoption of its Code of Procedure, followed closely English precedents in lunacy. As will be seen by reference to the chapter on Lunacy Legislation, its statutes reaffirmed most of the powers of the Lord Chancellor in the person of the corresponding officer here. Our code of lunacy statutes and practice remained consequently without change for many years. Even after the abolition of our Court of Chancery its rules continued to guide the practice of its successor, the Supreme Court, in its equity jurisdiction. These lunacy statutes have now reached to larger proportions in numbers and special topics embraced than the corresponding statutes of any other State. They may be said to form in fact a true Lunacy Code, having but recently been revised and consolidated.*

It must be evident that in this department legal questions are not of such frequent occurrence as to render them matters of familiar acquaintance with practitioners, nor do analogies borrowed from other departments of law furnish much light upon these subjects. Jurisdiction in cases of lunacy is, in civil matters, largely a mixed one of law and equity, and until frequent amendments of practice occur under new and reforming statutes, it is not always easy to decide under which jurisdiction remedies can most readily be obtained. Most of these difficulties have been obviated in New York by frequent amendments of our laws, and our practice has in consequence been simplified to a corresponding degree. In the organization also and management of our asylums, and the provisions made for the care of the pauper and indigent insane this State has made great progress; and lastly in establishing a system of supervision of its insane wards, it has completed its guardianship of all departments of its public charities.

1. Vide "Report on the Codification of the Laws relating to the Insane, with proposed Amendments thereto, etc., by Daniel Pratt, Attorney-General, and John Ordronaux, State Commissioner in Lunacy. Presented to the Legislature, March 31, 1874."

To unfold, therefore, the reason of the laws governing the civil and criminal status of the insane has been the object to which I have addressed myself in these commentaries. They are designed to cover not only the Revised Statutes of New York, but the whole field of those decisions in law and equity which give rise to some of the most difficult problems in jurisprudence. And inasmuch as they would be incomplete as a manual, without some discussion of the practical methods of enforcing these laws, I have added a chapter on Procedure, prefacing the whole work with a Digest of adjudicated principles in the Jurisprudence of Insanity, together with a synoptical sketch of the development of our statute law herein, in the form of a History of Lunacy Legislation in England and in New York.

J. O.

ROSLYN, N. Y., *March* 1, 1877.

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INTRODUCTION.

AND

DIGEST OF ADJUDICATED PRINCIPLES IN THE JURISPRUDENCE OF INSANITY.

All positive knowledge of insanity has been derived from the labors of physicians, who have been able to treat it successfully only in proportion as they have treated it as a disorder associated with disease of the bodily organs. It appears, also, as the result of their labors and conclusions, that it is a disorder of relation; of relation between the organs of the body, and of relation between those organs and the sources of mental manifestation. This of course does not unravel the dilemma, it only states it in a different form; but it is nevertheless a nearer approximation to a true interpretation of the physical bases of mental disorder, than has ever been made, and we are bound to accept it because experience sustains it. The fact also that it has been adopted among the canons of the healing art as a physical law for the medical treatment of the insane, is another proof of its acceptance by the most competent to test its truth. And if the maxim *cuique in sua arte peritus credendum est* has any weight in the field of human evidence, then we can appeal for confirmation to the testimony of the most philosophical psychologist of the century who says that "The notion of *mental disease* must therefore be deduced neither from the mind, nor from the

body, but from the relation of each to the other." (*Feuchtersleben, Med. Psych. p. 74.*)

Although, therefore, the conversion of a purely physical fact into a mental impression, and the consequent relation between body and mind remains inexplicable, we have yet sufficient proofs from the archives of practical medicine to show, that this interdependence of matter and spirit is amenable to guidance from without, as well as from within. It follows from this that the natural history of insanity is the field where the most valuable discoveries are to be looked for in the philosophy of mind in action. Here chiefly can analysis aid speculation in its deductions, and in this way by the study of salient phenomena, whether singly or in groups we are led to appreciate more correctly the modal conditions under which every mind acts in the midst of bodily influences.

Beyond this point, however, the power of human observation seems destined never to pass. The road which leads to the birth-place of mind is still immovably barred; and since there is nothing in the conditions of matter to evolve such a product, it becomes vain and profitless to speculate upon its origin outside of the sphere of a divine endowment. Outside of this no explanation explains its intuitions; within it, every faculty is seen to have been created with predestined duties, and a field of separate action. To know more, we must be more, since the greatest of modern, as of ancient philosophers can tell us nothing more definite of the nature or constitution of mind than did Cicero in his wonderful speculations upon the "Nature of the Gods." *Corpus quid sit intelligo, quasi-corpus quid sit non intelligo.* (*Nat. Deor., lib. 1, § 26.*)

The common law of England originally recognized, in common with popular opinion, but two classes of mental incompetents, viz.: idiots and furious lunatics. The former were adjudged, because of their congenital impairment, absolutely incurable. The latter were always presumed to

be recoverable. The jurisprudence of the day guided itself accordingly. In the case of the estate of an idiot the king, after office found, had a beneficial use; in the case of a lunatic, he was only a trustee. Inasmuch, also, as in all judicial problems where the aid of medical science is invoked, the medical dogmas of the day have necessarily infused themselves into the judgments of courts, it is reasonable to expect that these judgments should, in large measure, reflect the current opinions of medical philosophers. Thus, when court physicians believed in witchcraft and lunar influences, it could not be expected that judges would know better, and assign to phases of mental disorder the misconduct of individuals brought before them for trial. The logical conclusion of such a trial under the light of such expert opinions was inevitable. Lord HALE hung witches and Coke believed in them. It was excusable in them to do so in their day.

But exactly why precedents, resting upon belief in facts accepted at one time as true, and as completely confuted at another; exactly why precedents of this kind should bind courts for all subsequent time does not appear susceptible of logical demonstration. It cannot be said of such precedents that they rest upon logical principles, for they do not. They rest only upon ethical doctrines that borrow the light of their own day to support them. When that light is proved to be a false one, what becomes of the precedent built upon it? It is a somewhat remarkable fact that common law courts, with just as much authority to question and review non-statutory precedents as have courts of equity, should have followed so timidly behind them in this respect, particularly in the field of insanity. While, therefore, the jurisdiction of courts of equity has been constantly enlarging itself in relieving mental incompetents from the legal consequences of their acts, and even in taking steps, through inquisitions, to prevent the occurrences of such wrongs, common law courts in dealing with

crimes, as affected by insanity have, as a class, opposed any more modern or scientific light upon that subject than was bequeathed by Coke or Hale. This unflinching adherence to precedents in the law of insanity is due to the view habitually taken of the nature of that question. It has from the earliest times been treated too much as a question of law, susceptible of being decided by the application of legal tests, when it is more properly a question of fact to be decided by a jury, and under instructions of the court only as to the legal effect of such fact upon the question of responsibility, but without any expression of opinion on the part of the court as to the nature or character of the insanity, its effects on moral freedom, or any other fact belonging to it. As may be seen at a glance none of these problems are questions of law. They are purely questions of fact and experience, to be decided by a jury under the guidance of expert testimony, and without prompting by the court, which by so doing usurps the functions of the jury. "If," says Judge Doe, in *State v. Pike* (49 N. H. 441), "the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself to be an expert.

* * * * *

But the precedents require the jury to be instructed in the new medical theories by experts, and the old medical theories by the judge."

Under the early inquisitions of lunacy the jury could find but two forms of mental impairment, viz.: idiocy or lunacy. Commissions were not yet established, and all proceedings were by writ. In cases of lunacy it was generally required to be established that the party was either dangerous to himself or to others. And this term was conventionally interpreted to mean dangerous by reason of violence in demeanor, the old idea of a lunatic being

always that of a raving maniac. The Civil Law in its classifications of mental incompetents had included in one general class of *mente capti*, all forms of impairment of mind, except lunatics. The insane man was designated as "*furiosus*," the idiot, imbecile, crack-brained or foolish was *mente captus*. Idiot was a term unknown to the Roman Law, being a Greek word of little technical meaning. It was not, consequently, used in the sense in which we employ it. As to the "*furiosi*" who were assimilated to our modern lunatics and in whom recovery was always deemed possible, they were placed under curators as well as the *mente capti*, the deaf and the mute, and those laboring under a perpetual infirmity, and thereby unfitted to manage their own affairs. (*Inst., lib. 1, tit. 23, § 3.*)

Gradually, however, as the varying phases of mental impairment began to come within the field of judicial inquiry, and to provoke more critical study into their phenomena and limits, it became manifest that there were forms of unsoundness of mind which belonged neither to the regions of idiocy nor lunacy. Consequently, that the word "lunatic" must in law either assume a generic character as a name of multitude, or that a new class of mental incompetents must be recognized, standing midway of idiocy and lunacy. The term "unsoundness of mind" was thereupon interpolated into the law of insanity, and with it, instead of writs *de lunatico*, came our modern commission in the nature of writs *de lunatico*, with the more enlarged findings which they allowed the jury to return. The necessity for such a reform in lunacy practice was first pointedly suggested about the year 1784, when Lord HARDWICKE, in *Ex parte Barnesly* (3 Atk. 168) felt himself compelled to disclaim any jurisdiction over a case of mere weakness of mind, because there were no precedents to authorize it, although the inquisition found the party incapable of governing himself or of managing his estate. It was there held that lunacy was a technical term from whose

legal definition the court could not depart. Nevertheless and during all that time equity might relieve against the acts of persons incompetent to contract, while it could not yet prevent the necessity of such subsequent interference.

It is to the wisdom and judicial independence of Lord ELDON, exhibited in *Gibson v. Jeyes* (6 *Vesey*, 273, *A. D.* 1801), that we owe the first extension of the protectorate of a court of equity over the estate of a person neither an idiot, nor yet a lunatic, but simply laboring under mental incapacity to manage his own affairs. And it is here, for the first time, that the doctrine was promulgated that "unsoundness of mind" may exist *quoad* the case of one-self or one's own property which will justify the issuing of a commission in the nature of a writ *de lunatico inquirendo*, wherein it will not be necessary to find either idiocy or lunacy. This doctrine was further sustained by the same eminent authority in *Ridgway v. Darwin* (8 *Ves.* 65, *A. D.* 1802), and again by Lord ERSKINE in *Ex parte Cranmer* (12 *Ves.* 445, *A. D.* 1806).

The first case in New York in which this subject underwent discussion was that of *Barker* (2 *Johns. Ch.* 232), where Chancellor KENT gave unqualified assent to the views expressed by Lord ELDON and Lord ERSKINE, and grafted upon our equity jurisprudence one of the most beneficent of rules for the protection of the weak and infirm in mind. This rule has never been questioned in any court. It is founded upon a far-reaching knowledge of those mental infirmities, which deserve the protecting arm of a court of equity just as much as the more conspicuous forms of idiocy or lunacy. Thus history repeats itself in jurisprudence as well as in government, and the *mente captus* of the Roman Law re-appears in our later Saxon jurisprudence, as a person of "unsound mind" though not necessarily a lunatic or an idiot.

From the foregoing general principles, we deduce the following Digest of rules of law which have been established as settled doctrines in the Jurisprudence of Insanity.

I.

CONSTITUTION OF THE MIND UNKNOWNABLE.

The law can take no cognizance of the human mind severed from a living body, nor of its operations in a state different from that belonging to such an existence. It deals alone with the finite. It can only appeal to universal consciousness and rest there. Consequently the doctrines of metaphysics cannot be accepted by courts as guides for the elucidation of states of mental disorder. (*Ray's Med. Jur. Ins.*, § 53.) From ARISTOTLE to Sir WM. HAMILTON, mankind however reasoning high

“Of Providence, fore-knowledge, will and fate,
Fixed fate, free-will, fore-knowledge absolute ;”

are yet no more advanced to-day than were MILTON'S fallen angels, who, after discussing these problems in solemn conclave, retired discomfited,

“And found no end, in wandering mazes lost.”

II.

INSANITY A DISEASE OF THE BODY.

Insanity, to whatever cause primarily due, has its physical basis in a diseased condition of the brain. “Certain it is,” says Dr. RAY (*Med. Jur.*, § 131), “that as we have become better acquainted with the anatomy of the brain and with its sensible qualities, and been more thorough and persevering in our examinations, the rarer it has become to find a case of insanity presenting no organic changes after death.” (*See, also, article “On the Dependence of Insanity upon Physical Disease,” by Dr. John P. Gray, Sup't. N. Y. State Lunatic Asylum, in Am. Jour. of Insanity, for April, 1871, Vol. 27, p. 376.*)

III.

INSANITY HAS A VARIABLE MEANING IN MEDICINE AND IN LAW.

Insanity has at times a different meaning in medicine and in law. It is not always, therefore, the correlative of

non compos mentis. But these differences are not contradictory. They simply represent the mental parallax of an individual as computed under the different latitudes of the two sciences. In medicine, insanity means an established and prolonged departure of an individual from his natural mental condition, arising from bodily disease and not the immediate consequence of self-production. In law, insanity, or as it is generally designated, lunacy, covers nothing more than the relations of the person to the particular act which is the subject of judicial investigation, the question being, whether the transaction was the act of a rational, free moral agent, or simply an event in his life in which he was automatically and therefore involuntarily implicated through the agency of disease. And because of the physical law that empowers bodily diseases to fetter moral freedom, as well as to obscure mental lucidity, a law which courts of justice must recognize as operating upon all mankind, it follows that in all issues of insanity the legal problem must resolve itself into the inquiry whether there was mental capacity and moral freedom to do, or to abstain from doing the particular act.

But aside, also, from questions of contentious jurisdiction, the law recognizes states of mental infancy, such as idiocy, or extreme mental weakness arising from old age, disease, or habitual drunkenness, as justifying the creation of a class of mental incompetents over whom, under the designation of "persons of unsound mind" it casts the mantle of its protection. Yet to none of these persons does it apply the term "insane," although to all classes indiscriminately it gives the appellation of *non compos mentis*. (*Co. Litt.* 247, *a*; 4 *Rep.* 124, *b*; 4 *Blacks. Comm.* 25; *Ridgway v. Darwin*, 8 *Ves.* 65; *Matter of Barker*, 2 *Johns. Ch.* 232).

If now we compare the mental status which either science of law or medicine gives to the mental incompetent we shall find these trenchant differences, viz. :

1st. That a person may be insane medically speaking who, at law, is still *compos mentis*, as for instance during a lucid interval, or while so-called partially insane, and whose acts whether in the nature of contracts or testamentary dispositions would therefore be valid. (*Banks v. Goodfellows*, L. R., 5 Q. B. 549; *Gombault v. Pub. Adm.*, 4 Bradf. 225.)

2d. That a person may be insane medically speaking, who, at law, is still deemed *compos mentis*, and whose acts, if criminal, might subject him to a qualified responsibility, particularly, where the crime charged is one in which violence is required to be coupled with intent. (*R. v. Townly*, 3 F. & F. 839; *Whart v. Still*, *Med. Jur.*, Vol. 1, § 164; *Roberts v. People*, 19 Mich. 401; *Anderson v. State*, 43 Conn. 514.)

3d. That a person may be in law *non compos mentis*, so far as the performance of any acts of binding obligation upon him are concerned, who, at the same time, might not be, medically speaking, insane.

4th. That neither idiocy, nor imbecility, are diseases medically speaking, and to neither does the term "insanity" apply. Consequently an idiot is classified by himself, both in law and in medicine, as a mental infant capable of only the most limited development, while the term "imbecile" is unknown at law, expressing simply inferior mental capacity of variable character.

In all cases, whether of insanity or unsoundness of mind, to whatever cause due, the law judges the mental capacity of the individual *quoad* either his relations to himself or to others; and *quoad* his appreciation of the nature and consequences of his acts, and his freedom from duress while willing to do, or to abstain from doing them. It is only when, in relation to such particular acts, he is shown to be totally *non compos mentis* that the law can intervene to protect him or his estate against their consequences, torts

committed by him constituting the only exception to this general rule.

IV.

INSANITY A QUESTION OF FACT.

Insanity being always a question of fact is not amenable to any legal test. It must be proved like any other fact by the most competent evidence, and that of an objective character. A man's belief in his own insanity, or confession of its agency as a governor of his conduct, are not sufficient to prove the fact. Some other mind must gauge his mental capacity and interpret the legal significance of its actions. The only question which the law can consider in relation to it, is the part which it plays as an involuntary instigator of human conduct and a controller of moral liberty. It is a question of the proportions which it has assumed, as an instrument of duress over the individual mind, and of the effects which such proportions should be allowed to have upon rules of law governing either the rights of the State, or the rights and responsibilities of its citizens. Therefore, it is for the jury or experts to determine the fact of insanity; it is for the court to determine its effects on civil rights. (*State v. Pike*, 49 *N. H.* 408; *State v. Jones*, 50 *Ib.* 369; *State v. Johnson*, 40 *Conn.* 136; *Andersen v. The State*, 43 *Ib.* 514.)

V.

GENERAL MEANING OF INSANITY AT LAW.

Insanity at law means a permanently disordered state of mind beyond the control of the individual, and produced by disease. Until such permanent disorder is proved to exist, no presumptions of insanity can arise merely from the sudden and motiveless, the depraved, or the self-injurious nature of acts committed. All such acts are within the sphere of entire moral liberty, and sanity being the normal condition of the human mind is favored by the general presumption. The burden of proving insanity is,

consequently, upon the party alleging it. (1 *Greenl. Evid.*, § 42; *Peaslee v. Robins*, 3 *Metc.* 164; *Brooks v. Barrett*, 7 *Pick.* 94.)

VI.

LEGAL STATUS OF INSANITY.

There is no other insanity known to the law than that which implies lunacy, or a permanent disorder of mind, *non compos mentis*. By "unsoundness of mind" is understood a condition of mind contra-distinguished from idiocy on the one hand and lunacy on the other, and yet such as justifies a commission to inquire of idiocy or lunacy. (*Ridgway v. Darwin*, 8 *Ves.* 65.) Unsoundness of mind means, therefore, any form of mental weakness or impairment due either to age or sickness, and distinct from the effects of idiocy or lunacy. (*Matter of Barker*, 2 *Johns. Ch.* 232.) Dementia being the suspension of mental activity is the condition into which all exhausted minds, by whatever cause impaired, ultimately gravitate. It is apparently the sleep of the mind, behind the curtain of non-entity.

The terms "monomania," "partial insanity" and "moral insanity," describing, as they do, predominant and disconnected symptoms of a common disease, are often misleading through the manner of their application. The mind is not formed of compartments, each tenanted by a separate faculty and with impassable walls around it. On the contrary it is unitary in principle, and cannot, therefore, be disordered exclusively in parts. The term "monomania" simply means the *predominant* expression of one or more symptoms of insanity and not any *exclusive* form of mental unsoundness, which, from the very constitution of the human mind, is, as above shown, paradoxical. (*Waring v. Waring*, 6 *Moore's P. C.* 341; *Smith v. Tibbett*, *L. R.*, 1 *Prob. & Div.* 398.) Although the doctrine laid down in these two cases, which is to the effect that partial insanity in a tes-

tator invalidates his will because it is the offspring of a wholly unsound mind, has been overruled by the later case of *Banks v. Goodfellow* (*L. R.*, 5 *Q. B.* 549), still, as Prof. WHARTON remarks in his *Medical Jurisprudence* (*Vol.* 1, § 47), "If we view the question psychologically, it will be difficult to overthrow the reasoning of LORD BROUGHAM and Lord PENZANCE." (*Ibid.*, § 570.)

VII.

ATTEMPTED DEFINITIONS OF INSANITY.

The most accurate of all definitions of insanity, if any thing more than a description can be given of this mental Proteus, is that of Dr. ANDREW COMBE, cited by Dr. RAY in his *Medical Jurisprudence of Insanity* (§ 134), who says that "it is the prolonged departure without an adequate external cause, from the state of feeling and modes of thinking usual to the individual when in health, that is the true feature of disorder in mind." This definition excludes *ex vi termini* the idiot, immovably fixed, and who cannot depart from himself, being *semper instans sibi*; and the imbecile who, but a few removes from him, oscillates within a narrow arc of mental possibility. Any mental departure from himself in an imbecile must almost immediately precipitate him into idiocy, since beside proximity to it, all disorder of mind tends downwards, and the true imbecile only represents in his best state of mental health a higher order of idiocy.

VIII.

VARIABLE EFFECTS OF LUNACY ON CIVIL RIGHTS.

The term "lunatic" was unknown to the common law. COKE discarded it as meaningless, and it is not mentioned by FITZHERBERT, who gives us as the only writs of inquiry applicable to unsoundness of mind that *de idiota inquirendo*, and *dum non fuit compos mentis*. (*De Nat. Brev.* 202, 232.) The careless use of this word often leads to con-

fusion in determining the civil rights of an individual. Thus it is common to say that a lunatic, except in the purchase of necessities, can do no valid act. In reality, however, and for the purpose of invalidating the acts of a party of alleged unsound mind, it is not sufficient that he be an alleged lunatic, or even confined in an asylum, to constitute him retrospectively *non compos mentis* at law, but he must be found so by inquisition. This arises from the fact that a finding of *non compos mentis* against a party is tantamount to a civil disfranchisement, which being a *capitis deminutio* or loss of status can only result at common law, and under our Constitution from a judgment of one's peers. Hence the distinction must be kept in view between a lunatic before office found and a lunatic after office found, since it is to the latter only that the term *non compos mentis* legally applies. And before office found the acts of an alleged lunatic are only *voidable*, after office found they are void. (*Jackson v. Gumaer*, 2 Cow. 552; *Dexter v. Hall*, 15 Wall. 9.) This has always been the settled rule in England. Mr. FONBLANQUE speaking to this point says, "I have not found a single case in which the plea of *non compos* by the lunatic himself, before inquisition, has been allowed." (*On Equity*, p. 62.) And in *Bonner v. Thwaites* (*Tothill*, 130), it was said that chancery will not retain a bill to examine the point of lunacy. The reason for this evidently is that a court of chancery in judging upon a point of insanity is governed by the rules of law, and legal capacity is always to be presumed until its absence is judicially established, there being no such thing as an equitable incapacity where there is a legal capacity. (*Osmond v. Fitzroy*, 3 P. Wms. 131.)

IX.

CONSTANT JUXTAPOSITION OF REASON AND UNREASON.

No lunatic is wholly without reason. In the midst of lunacy the logical operations of the mind, though dis-

turbed, are not necessarily extinguished. There is a constant juxtaposition of reason with unreason, each crowding the other in turn out of the chair of government. And as nature always works toward restoration, so gleams of reason are ever bursting through the clouds of mental darkness. It is thus seen why the innate force of logic frequently re-asserts itself in the midst of incoherence, and gives consistency of action even to the phenomena of insanity. Hence, *all* the symptoms or characteristics of insanity mentioned by experts need not be manifested by an individual to warrant a finding of *non compos*. (*Matter of Vanauken*, 10 *N. J. Eq.* 186.) It is this law of natural logic constantly resisting disturbance, however arising, which so readily unmasks the simulator of insanity, for nature does not tolerate paradoxes.

X.

DELUSION AT LAW.

The term "delusion in law" is intended to express a permanent hallucination. It is without value, however, until qualified by the adjective "insane." An insane delusion therefore is an incorrigible belief in the existence of a non-existent, objective fact. It is a purely subjective fact, born of the imagination of the believer. The condition of mind in which an individual is thus placed who cannot extirpate an insane delusion constitutes an unsound mind. (*Waring v. Waring*, 6 *Moore's P. C. C.* 341; *Freeman v. People*, 4 *Denio*, 27.)

XI.

DELUSION NOT OMNI-PRESENT IN INSANITY.

Delusion is not always manifested in insanity, nor is its presence indispensable to the judicial proof of the disease. A mind may be convulsed by the rapidity of its idealizations, and speech and conduct may become violent and incoherent without any manifestation of delusion.

There is unquestionably such a condition as that of mental vertigo, or mental stammering, in which there is irrepressible activity of mind without power of self-control and yet without hallucination. A mind in this condition is like a passenger in an express train who attempts to count and to describe near objects as he flies by them. He sees and knows what they are, yet cannot describe each accurately, nor check the velocity of his motion to examine them. This mental vertigo in the insane is not always accompanied by violence of demeanor, or irrepressible loquacity. Quite the opposite may be the case, and in this way a brooding, taciturn, melancholia may precede a noisy ebullitional mania.

It must be self-evident also, that no particular kind or degree of delusion constitutes insanity. As minds vary in original power and scope of reasoning, so their action, when disordered, will follow in some measure the limits of the mould in which they have habitually exercised themselves.

XII.

NO SINGLE SYMPTOM CONSTITUTES PROOF.

No single symptom *per se* constitutes absolute proof of insanity. Symptoms must be grouped, and it is only by a differential comparison of the present and past states of the individual mind that we can deduce any definite conclusions as to its departure from a state of sanity.

XIII.

THE LAW DOES NOT MEASURE DEGREES OF WEAKNESS IN ONE WHO IS COMPOS.

So long as a party is *compos mentis* he has legal competency, for the law will not measure the size of his mental capacity, and no degree, therefore, of physical or mental imbecility can avoid his deed if he had legal competency. (*Hovey v. Chase*, 52 Me. 305.) And where a contract is sought to be avoided on the ground of the incapacity of

one of the parties, but without any imputation of fraud, the only test of mental capacity is the ability of the party to rightly comprehend the nature of the particular transaction, and the probable results which will flow from his entering into it. Absolute soundness of mind is not therefore required, and proof of delusion upon un-related subjects will not invalidate the act. (*Hovey v. Hobson*, 55 Me. 256; *Sozean v. Shields*, 23 N. J. Eq. 509; *Dennett v. Dennett*, 44 N. H. 531; *Jackson v. King*, 4 Cow. 207; *Odell v. Buck*, 21 Wend. 142.)

XIV.

KNOWLEDGE OF RIGHT AND WRONG NOT ALWAYS EXTINGUISHED BY LUNACY.

A knowledge of right and wrong is possessed by the majority of lunatics as a class. Its absence is exceptional. It cannot, therefore, be any test of their power of controlling their conduct, any more than of controlling their disease. They are always under some form of mental duress while their disease lasts; and the only test of their criminal responsibility is their capacity to choose *not* to do an act to which they are impelled by disease, coupled with the power of enforcing self-obedience to that choice. If they have not capacity to choose between two courses of conduct, or if having capacity to choose they yet have not power to execute their choice, then their acts are not the acts of a responsible agent. (*People v. Kleim*, 1 Edm. S. C. n., p. 34; *Comm. v. Haskell*, 2 Brewst. 401; *Stevens v. State*, 31 Ind. 485; *State v. Felter*, 25 Iowa, 67.)

XV.

QUALIFIED RESPONSIBILITY OF WEAK-MINDED PERSONS.

There may be a degree of unsoundness of mind which, nevertheless, does not disqualify a party from entering into a contract or making a will, and which in turn will not relieve him from entire responsibility for his wrong.

ful acts. Responsibility in his case becomes qualified and *sub-modo*. While, therefore, he might not be competent on a given occasion by reason of such mental weakness to deliberate upon and premeditate an act of homicide, so as to bring it within the definition of murder in the first degree, he might yet sufficiently intend the act as to justify his conviction in the second degree. The rule is well settled that where a statute makes an offense to consist of an act combined with a particular intent, that intent is just as necessary to be proved as the act itself, and must be found by the jury, as matter of fact, before a conviction can be had. The condition of mind to which the above rules of law particularly apply, is that frequently observed in epileptics and habitual drunkards of long standing, in whom there is chronic irritation of the brain with inability to endure sudden mental strain. (*State v. Johnson*, 40 Conn. 136; *Andersen v. State*, 43 *Ib.* 514; *Roberts v. The People*, 19 Mich. 401; *People v. Stillman*, Monroe Co. [N. Y.], *Oyer & Terminer*, March Term, 1877; *People v. McNamara*, Steuben Co. [N. Y.], O. & T., Dec. Term, 1877.)

XVI.

TRANSITORY DELIRIUM NOT INSANITY.

So called Transitory or Spontaneous Mania is not, legally speaking, insanity, any more than a violent temper, voluntary intoxication or the delirium of fever. Unless, therefore, it can be shown to have been preceded by great injuries to the brain, or great moral shocks visibly affecting the mental and moral character of the individual, all presumptions founded upon the natural laws of disease are against it. No disease springs suddenly into maturity of manifestation from a condition of previous health. Every organic fact is the sequence of a cause requiring a period of incubation for development of its fruits. And mania in whatever form exhibited is governed by the same pathological laws as other diseases. (*Ray, Op., cit.* § 133.)

XVII.

LATENT INSANITY NOT COGNIZABLE AT LAW.

Although such a condition of mind undoubtedly exists as constitutes latent insanity, still the law can take no cognizance of it so long as it is not an evidential fact, nor until it has exhibited itself by certain unmistakable symptoms of mental instability. But in any event it is a question to be determined alone by the jury or experts, and not by the court, being purely a question of fact *sui generis*. (*Roberts v. The People*, 19 Mich. 402.)

XVIII.

LUCID INTERVALS.

A lucid interval in law means a suspension of the active manifestations of mental disorder. It implies a temporary diminution in the intensity of the insanity and describes simply a point of oscillation in the progress of the disease. It is a gleam of sunshine breaking through the clouds of mental obscuration. Nothing more. But the clouds are still moving over the disk of the mind and their edges are ragged and of variable diameter, so that while portions of the mental processes are in the area of lucidity, others remain within the shadow of the eclipse. Hence a lucid interval in law does not imply complete restoration of reason. It only means restoration to the degree of enabling the party to judge soundly of the act. (*Hall v. Warren*, 9 Ves. 611; *Boyd v. Eby*, 8 Watts [Penn.], 66; *Evans' Pothier on Oblig., Appendix*, 579; *Gombault v. Pub. Adm.*, 4 Bradf. 226.)

XIX.

SUICIDE NO PROOF OF INSANITY.

Suicide *per se* proves nothing in relation to the mental state of the perpetrator. Both the sane and the insane commit the act. It is the previous mental history of the party which alone, under the interpretation of an expert, can

furnish an answer to the question of *compos* or *non compos*. Therefore no presumption of insanity arises merely from the act of suicide, and at common law the goods and choses in action of a *felo de se* were not vested in the king, until office found. (*King v. Saloway*, 3 *Mod.* 100; *Burrows v. Burrows*, 1 *Hagg. Ecc. R.* 109; 1 *Dow's H. L. Cas.* 187; *Terry v. Life Ins. Co.*, 2 *Bigelow*, 31.)

XX.

TESTAMENTARY CAPACITY.

Testamentary capacity means the capacity to know and name one's property; to resist undue influence exercised in opposition to natural affection or justice, together with knowledge of what would be the course of distribution of the property if no will were made. (*Delafield v. Parish*, 25 *N. Y.* 9.) Hence the current of authorities, both in England and the United States, favors the rule that even the exhibition of delusion by the testator does not affect the validity of a will, unless such delusion enter into and infect its subject-matter, and then it will only nullify such parts of a will as it reaches. (*Banks v. Goodfellow*, 39 *L. T. R. [N. S.] Q. B.* 257; *Pidcock v. Potter*, 68 *Penn. St.* 342.)

XXI.

PARTIES AGAINST WHOM A COMMISSION MAY ISSUE.

The object of a commission of lunacy in civil cases being to protect the property of a mentally incompetent person against mismanagement and waste, by bringing it within the custody of a court, it follows that to support a commission, in the nature of a writ *de lunatico inquirendo*, it is *not* always necessary to show that the party is either an idiot or a lunatic in the medical sense of the term. Nor need the jury inquire into the precise nature or name of the mental infirmity under which the party is laboring. It is sufficient that he be mentally incompetent to govern himself or to

manage his own affairs, from whatever cause this incapacity may arise. Hence permanent mental weakness amounting to such incapacity and arising from advanced age, sickness, habitual drunkenness, or imbecility constitutes in law "*unsoundness of mind*," and as such becomes tantamount in its effects to those produced by idiocy or lunacy, for such conditions all equally express mental incapacity for the government of oneself and the management of one's affairs. It is the duty, therefore, of the jury, and they have the right to declare a person of unsound mind, who is shown to be in such a permanent state of mental incapacity as to be incapable of governing himself or of managing his own affairs, to whatever cause due. Such a person is in legal intendment *non compos mentis*. (*Matter of Barker*, 2 Johns. Ch. 232; *Matter of Burr*, 17 Barb. 14; *Ex parte Cranmer*, 12 Ves. 445; *Ridgeway v. Darwin*, 8 Ves. 65; *Sherwood v. Sanderson*, 19 Ib. 280; *Carew v. Johnson*, 2 Sch. and Lef. 280.)

XXII.

RESTRAINTS UPON PERSONAL LIBERTY.

The right to confine a lunatic in an asylum is an incident belonging to his medical treatment. It has no other justification than necessity and may be exercised only so long as that necessity continues. A lunatic, therefore, should not be deprived of his liberty unless restraint is necessary or beneficial. (*Comm. ex rel. Nyce v. Kirkbride*, 2 Brewst. 586.) Even the committee of a lunatic should only confine him when authorized to do so by the court. (*Comm. ex rel. Haskell v. Kirkbride*, 3 Brewst. 586.) The right to confine is in fact wholly distinct from the duty to protect or maintain, and does not flow necessarily out of the fact of lunacy. Not because a person, therefore, is a proper subject for a commission of lunacy does it follow that he is a proper subject for confinement. Lunacy, as is well known, is a term of too variable a significance to per-

mit such a latitude of construction to be put upon it as that of assuming that every lunatic is necessarily dangerous to himself or to others. Facts do not justify any such conclusion. And it would be as great an outrage to confine a man unnecessarily because he happened to be a lunatic, as it would be to compel him to take an unnecessary medicine, or to submit to an unnecessary surgical operation. While it must be left most properly to the superintendent of every asylum, acting as a custodian of the lunatic, to decide in what manner such confinement should be exercised, and when it should terminate, courts still retain to themselves the right of demanding proof at any time that the reasons for such confinement continue. For in the contemplation of the law a lunatic is always recoverable. (*Dormer's Case*, 3 P. Wms. 265.)

The only legal grounds therefore upon which a lunatic can be restrained of his liberty in an asylum are :

First. That his disease is in such a stage as to require seclusion, and even restraint.

Second. That he is dangerous to himself or to others being either suicidal or homicidal, by reason of dispositions to personal violence under the ordinary friction of unrestricted intercourse with society. But such dangerous character must have given some proof of its existence, and must not rest solely in the imagination of others.

Third. That he has dangerous and uncontrollable propensities looking toward the destruction of property on a large scale as by arson, and is, therefore, a menace to the safety of the community.

Fourth. That he is disposed to wander about and get lost, and thus to suffer for want of food or shelter ; to expose himself to the same accidents as befall a child, and that he cannot be properly restrained and supervised at home. And in relation to discharging such a person from an asylum, it has been held that where a person is an imbecile, and unable to take care of himself, the court will

not discharge him. (*Comm. ex rel. Haskell v. Kirkbride*, 3 *Brewst.* 586.)

XXIII.

AUTHORITY TO SELL LUNATIC'S REALTY WHENCE DERIVED.

Restoration to sanity being always a presumption of law in the case of a lunatic, the Statute of 17th Edw. 2, ch. 10, did not authorize the sale or alienation of his lands or tenements, but simply provided for their safe-keeping. The power of the court of chancery included nothing beyond the care and supervision of such estates. (*Ex parte Dikes*, 8 *Ves.* 79.) The right of any court, therefore, to order a sale of the real estate of a lunatic or infant is not an original power, but rests alone upon special authority granted by the legislature for that purpose. And although neither a lunatic nor an infant are persons *sui juris* they may still hold lands in fee, so that even a legislature cannot authorize or validate a sale of land devised to them with a restriction upon alienation. (*Stewart v. Griffith*, 33 *Mo.* 13, 24.)

The right of any legislature in the United States to grant such powers of sale or alienation of an infant's or lunatic's real estate to any court, arises from the fact that the legislature with us is the fountain of the law, and the *parens patriæ* to prescribe such rules and regulations as it may deem proper for the superintendence, disposition and management of the estates of all persons under legal disabilities. "But even that power," says Chancellor WALWORTH, "cannot constitutionally be so far extended as to transfer the beneficial use of the property to another person, except in those cases where it can legally be presumed the owner of the property would himself have given the use of his property to the other, if he had been in a situation to act for himself." (*Cochran v. Van Surloy*, 20 *Wend.* 373; *Rice v. Parkman*, 16 *Mass.* 326; *Suydam v. Williamson*, 24 *How.* 427; *Cooley's Const. Lim.* 101; *Sedgwick Stat. & Const. L.* 147.)

It has been seriously questioned, however, whether a legislature can constitutionally authorize the *guardian* of a lunatic or infant to sell his real estate and apply the proceeds to the payment of his debts, such an act being an exercise of judicial authority on its part. And accordingly in New Hampshire (4 *N. H.* 572), and in Tennessee (10 *Yerg.* 59) it was held that such special acts were void on the ground that they were judicial acts. Mr. SEDGWICK (*op. cit.* 148) condemns the exercise of any such powers on the part of a legislature, holding that "a legislative body is, from its character, organization and habits of business, entirely incompetent to pass discreetly upon questions involving private rights." On the other hand Judge COOLEY (*op. cit.* 103) says that "this species of legislation may perhaps be properly called prerogative remedial legislation. It hears and determines no rights; it deprives no one of his property."

But in the case of a court exercising powers of alienation in pursuance of a general law, the rule always applies that such statutes being in derogation of the common law must be construed strictly. Hence no mandatory provision can be dispensed with, the court being without discretionary powers in its obligation to follow the statute. Every requirement is substantial and must be complied with. (*Battell v. Torrey*, 65 *N. Y.* 204; *Matter of Valentine*, *N. Y. Court of Appeals*, Jan. 1878, 3 *Abbott's N. C.* 285.)

XXIV.

SPIRITUALISM BEFORE THE LAW.

The law can take no cognizance of spiritualism as a physical fact, because witnesses from another world are not within its jurisdiction, nor amenable to the rules governing judicial evidence. They cannot be called by subpoena, cross-examined, or punished, if disobedient. Its dealings being with the finite rights of finite men over

finite things, it cannot give any personal standing to that which is without the pale of time, place, or legal circumstance. Such things are out of its jurisdiction, therefore out of its authority. They are in fact extra-territorial to the municipal law of every country.

Whether a belief in spiritualism constitutes a delusion will depend upon its effects on the mind of the believer. That only is a delusion, properly speaking, which produces habitual disorder, in the logical process of the mind, with habitual perversion of the moral affections. Therefore a man may believe in spiritualism without being *non compos mentis*, at law, or again he may believe in, and be deluded by it within the sphere of his moral agency as a business man, or in his family relations, or as a testator, or lastly as a criminal. It is not the fact of the belief, but the effects of the belief, which should be studied in determining the origin or extent of any delusion which appears to be the offspring of spiritualism. (*Redfield's Am. Lead. Cas. on Wills*, 384.)

XXV.

TRIAL BY JURY NOT AN INDEFEASIBLE RIGHT, IN ISSUES OF INSANITY.

A question of personal liberty at law is one which rests primarily upon the law of the status of the individual. The right of the status or condition is the proper standard by which to determine the application of any local laws relating to the person. This right ante-dates municipal laws, being founded on a universal jurisprudence, or *jus gentium*. Now under the law of the status, an infant in the house of his guardian, a married woman in the house of her husband, or a lunatic dangerous to be at large, can each be restrained technically of their personal liberty without affording any necessary foundation for an action of false imprisonment. At common law, any person might confine a dangerous lunatic as a matter of common right, and under the maxim *salus populi suprema lex*. (4 *Blacks. Comm.* 25; *Colby v. Jackson*, 12 *N. H.* 253.)

So any one might justify an assault committed to restrain the fury of a lunatic. (*Brookshaw v. Hopkins, Lofft.* 243; *Comyn's Dig., Battery, H.*) These common law principles are not changed by statutes prescribing methods of enforcing them. The earliest English statute taking judicial cognizance of lunacy is that of 17th Edw. 2, ch. 9, passed in 1324, in which it is enacted that "the king shall have the custody of the *lands* of natural fools," and by chap. 10, "the king shall provide, when any happen to fail of his wit, as there are many having lucid intervals, that their *lands* and tenements shall be safely kept," etc. In such cases, the king might award his writ to the escheator or sheriff of the county to determine the same by an inquest of office.

It will be noticed that an inquest by a jury was thus limited alone to persons of non-sane memory having lands or tenements in their own right. But in no sense was such inquiry instituted to determine upon their liberty. That was left to be governed alone by the common law, and in each case, *ex necessitate rei*, as in the instance of any person who like an infant, or married woman was not *sui juris*. For wrongs done to them, a court of competent jurisdiction might at any time afford summary relief, and that too without the intervention of a jury. This principle of the common law has never changed. It still governs the tribunals of England and the United States, because it is a prerogative power of the court representing the State as *parens patriæ*. Such a court, therefore, can always inquire into the status of a person to inform its conscience, and as we shall presently show, may determine the method by which it shall inform itself.

If we now examine the Great Charter of John as the original Bill of Rights of all English jurisprudence, we shall find that it distinctly recognizes status as the basis of a personal right. Thus in the famous personal liberty clause, it recites that no *freeman shall be taken or impris-*

oned, etc., but by lawful judgment of his peers or by the law of the land." Now England at that time was full of villeins, *adscripti glebæ*, to whom the benefit of this clause did not practically extend. For says COKE (2 *Instit.* 45) "This extends to villeins, *saving against their lord.*" Therefore whether sane or insane they were slaves, or persons not *sui juris* as against their lords and guardians. The same rule of interpretation applied to slaves in this country, under the Constitution of the United States. They were governed by the law of the status, independently of local laws, and had no rights of personal liberty as against the will of their masters. And because of this law of status they were not within the immediate pale of the law of the land.

The principles of universal jurisprudence show that, in every case where guardianship of the person is necessary in *favorem vitæ*, it may be exercised by a court upon a view of the facts satisfying its conscience, and that it is entirely within its discretion, as to how or by what means it shall enlighten itself. Thus in *Smith v. Carll* (5 *Johns. Ch.* 118), KENT, Chancellor, held that a court of equity had original jurisdiction to be exercised according to a sound discretion to try questions of fact without the intervention of a jury. And the same principle had been previously affirmed by the House of Lords in *Evans v. Blood* (4 *Bro. P. C.* 557), both cases involving issues of insanity.

Upon such authorities as these, it does not seem necessary to discuss any further the question whether there be such a thing as a common law or even a constitutional right to a trial by jury of a lunatic to determine whether he shall be restrained of his liberty, that being a result which flows presumably, though not absolutely from his status, and which the court alone may in its discretion decide. The finding of lunacy by a jury does not *per se* authorize restraint upon personal liberty, because this latter is a distinct fact varying with circumstances. Hence

in *Nyce's case* (2 *Brewster*, 400) it was held that even after a finding of lunacy, it is a question for the court, whether the patient shall be restrained.

The original object of all the ancient inquisitions of lunacy was to determine whether a party possessed of lands or tenements was, or not competent to manage himself and his property; not whether he was dangerous to be at large, for then any one might restrain him, and this principle of the right of a court of competent jurisdiction to pass upon a question of lunacy without a jury, even as relates to property-holding lunatics, has been constantly re-affirmed and in England is now permanently established by the 16th and 17th Vict., ch. 70, where it is enacted as follows, viz. :

“§ 38. Any commission in the nature of a writ *de lunatico inquirendo*, directed to one person, or to two persons, and the inquisition returned thereon, shall be as valid and effectual to all intents and purposes, as if directed to and returned by more than two persons.”

“§ 41. Where the alleged lunatic demands an inquiry before a jury, the Lord Chancellor intrusted as aforesaid, shall in his order for inquiry direct the return of a jury unless he be satisfied, by personal examination of the alleged lunatic, that he is not mentally competent to form and express a wish for an inquiry before a jury.”

The foregoing provisions have been in operation since 1853. Their validity has never been questioned, nor has it been charged that they deprive any subject of a right possessed by him either at common law, or under the Great Charter. Under the light of such a jurisprudence as that of England as well as under our own Constitution there seems to be no doubt of the right of any State to enact that an issue of insanity may be tried by a commission of two or more persons, and without the intervention of a common law jury.

CHAPTER FIRST.

HISTORY OF LUNACY LEGISLATION.

LUNACY LEGISLATION IN ENGLAND.

We derive so much of our equity, as well as our common-law jurisprudence, from England, that, in a field like that of Lunacy, where both jurisdictions have an almost concurrent authority, it is impossible to trace the legislation of our State without finding its foundations ultimately resting in that of the mother country. Without attempting, therefore, even so much as a sketch of that legislation as it has come down to us in statutes and judicial decisions, we shall endeavor to select and to utilize those parts only which bear directly upon the history of our own.

It is natural, under all forms of government, that the parental authority of the State should ever be extended over infancy, idiocy and lunacy, as conditions of helplessness that cannot be exclusively intrusted to the care of relatives or friends. The citizen everywhere belongs to the State, and in return the State owes him its protection and care, particularly when he is without the use and enjoyment of his mental powers. Under such circumstances the means employed to furnish that protection will always be a fair test of the moral attributes which the State attaches to the discharge of this duty. We must not, in consequence, expect to find uniformity in means, even where we are compelled to admit uniformity in spirit and apparent intent. Thus in England, while under the feudal system the office of the Crown was in spirit patriarchal, the means resorted to for protecting idiots and lunatics were fully in keeping with the rapacity of the age. The

escheators whose duty it was to discover forfeitures that might enure to the benefit of the Crown, are represented, by historians like Hallam* and writers like Shelford,† to have been little else than oppressors of the people.

That the management of the estates of idiots, if not of lunatics, must have been in early times an important source of revenue to the Crown, may be inferred from the fact that Blackstone treats of this subject in the chapter devoted to the King's *revenue*, beginning as follows: "I proceed, therefore, to the 18th and last branch of the King's revenue, which consists in the custody of idiots, from whence we shall be naturally led to consider also the custody of lunatics." (*Book 1, ch. 8, § 18.*) Mr. Fry, in his treatise on the Lunacy Acts (p. 7, *n.*), very strikingly remarks that "It seems to us, in the present day, somewhat startling to find the subject dealt with in this manner, as if idiots and lunatics were only worthy of consideration as forming a part of the King's financial resources; but it must be remembered that it was for the protection of the insane person's property and its preservation for himself or his heirs, and not for the benefit of the royal revenue, that the Statute of Edward 2nd was passed. It had, so far, a benevolent intention, though it did not contemplate the more important object, which has obtained so much prominence in our own times, the cure, or at least the kindly and considerate treatment of the insane person himself." Lord HARDWICKE, in *Ex parte Southcote* (*Ambl.* 111), remarked, in relation to this subject, that "he could not find one writ directed to the escheator to inquire of *lunacy*. The escheator was an officer for the Crown revenue, and in case of lunacy, *where no profits go to the Crown*, the writ was never directed to the escheator."

Originally, persons of unsound mind were divided into two classes, viz., *Idiots* and *Lunatics*; and the ancient

* Middle Ages, ch. 8, pt. 3.

† On Lunatics, p. 87.

mode of proceeding, when an information was lodged with the King that a person seized of any real estate was an idiot or lunatic, was to issue a writ to the sheriff or escheator of the county where the party resided, to try by a jury whether such allegation was true or not. In the case of an idiot, a writ "*de idiota inquirendo*" was issued to the escheator alone. These writs, although alike in substantive matter, differed slightly in phraseology; but in each there was one common and essential inquiry, viz., whether the party was an idiot from his birth, as alleged, or not? When persons *non compotes mentis*, by reason of the superior knowledge of the character and degree of their infirmity, became classified into lunatics as well as idiots, a new writ, *de lunatico inquirendo*, was framed to meet the new distinction. Gradually these writs gave place to our modern commissions, which are in the nature of writs of lunacy, and they have been made to extend to persons not insane, although of unsound mind, and in New York to habitual drunkards. The forms of these old writs may be found in Fitzherbert *De natura brevium* (Vol. 2, p. 232), and because of the fact that inquiry by commission, rather than by writ, is more general and wide reaching in its application, the former has accordingly superseded the latter.

Blackstone observes that "to lunatics, as well as to idiots, the King is guardian, but to a very different purpose, for the law always imagines that these accidental misfortunes may be removed, and only constitutes the Crown a trustee for the unfortunate persons, to protect their property and to account to them for all profits received, if they recover, or, after their decease, to their representatives." (*Book 1, ch. 8, p. 304.*) Hence, the custody of the born idiot and of his lands was originally vested in the lord of the fee, and subsequently, by reason of the manifold abuses to which it gave rise, transferred to the King by 17 Edw. II, ch. 9, which declares that

"The King shall have the custody of the lands of natural

fools, taking the profits of them without waste or destruction, and shall find them their necessities, of whose fee soever the lands be holden. And after their death he shall restore them to their rightful heirs, so that no alienation shall be made by such idiots, nor their heirs be in any wise dis-inherited." (*De Prerogativa Regis*, 17 *Edw. 2nd*, ch. 11.) And it is in contra-distinction recited by the same statute in relation to *lunatics* that

"Also, the King shall provide, when any (that before-time hath had his wit and memory) happen to fail of his wit, as there are many having lucid intervals, that their lands and tenements shall be safely kept without waste and destruction, and that they and their household shall live and be maintained competently from the issues of the same; and the residue, beyond their reasonable sustentation, shall be kept to their use, to be delivered unto them when they recover their right mind, so that such lands and tenements shall in no wise, within the time aforesaid, be aliened; nor shall the King take any thing to his own use. And if the party die in such estate, then the residue shall be distributed for his soul by the advice of the ordinary." (*Ibid.*, ch. *XII.*)

These two provisions, which should be read in unison, will be found to represent a step in the direction of natural equity and justice, such as has only been imitated, but not surpassed, in modern times. To-day, instead of the King, or with us the State, it is the court which takes charge of the person and estate of all *non compotes mentis*, and through its appointed bailiff, the committee of the person and estate, it effectually watches over and guards against waste the possessions of its insane wards. Thus does this old Saxon statute still inform the jurisprudence of our own times; and it is a remarkable illustration of the vitality of good laws that the statute of 17 *Edw. 2* (A. D. 1324) continued in force until the 26 & 27th *Vict.*, ch. 125 (A. D.

1863), repealed all its provisions, except the two above cited, which are still in operation.

The first act for regulating insane asylums in England was passed in 1774 (14 Geo. 3rd, ch. 49), and by it the Royal College of Physicians was required to select five of its Fellows as commissioners to visit and license mad-houses within the cities of London and Westminster, and seven miles thereof, and also the county of Middlesex, the discharge of similar duties throughout the country being assigned to justices of the peace. Two other acts, having the same object in view, were passed in 1779 and 1828. In 1832, by the 2 & 3 Wm. 4th, ch. 107, the Lord Chancellor was authorized to appoint annually the Metropolitan Commissioners in Lunacy. Subsequent Acts *in pari materia* were passed in 1833 (3 & 4 Wm. 4, ch. 64), in 1835 (5 & 6 Wm. 4, ch. 22) and 1838 (1 & 2 Vict., ch. 73), 1841 (5 Vict., ch. 4) and 1842 (5 & 6 Vict., ch. 87). Many of the foregoing statutes were of prescribed duration, hence the necessity of their re-enactment with amendments. Finally all foregoing acts were repealed in 1845 by 8 & 9 Vict., ch. 100, which organized the present Board of "Commissioners in Lunacy." The first act which noticed pauper lunatics in England was passed in 1744* (17 Geo. 2, ch. 5). That act was followed, and, as far as possible, adopted by the Legislature of New York in chap. 31, Laws of 1788.

GOVERNMENTAL SUPERVISION OF THE INSANE IN GREAT BRITAIN.

The Lunacy officers of the Crown in England consist of the Lord Chancellor, two Masters in Lunacy, to be appointed by the Lord Chancellor, and who must be serjeants or barristers of ten years' standing, and three Visitors of Lunatics, consisting of two medical and one legal visitor. The Masters in Lunacy have associated with them a Registrar, and the Visitors of Lunatics a Secretary, with such subordinate clerks and officers as may be sanctioned

* Fry on the Lunacy Acts, p. 143.

by the Lord Chancellor and the Lords of the Treasury. Besides the above-mentioned Masters in Lunacy and Visitors of Chancery Lunatics, there is a Board of Six Visiting Commissioners in Lunacy, consisting of three medical and three legal members, with three non-visiting commissioners. This Board also appointed by the Lord Chancellor is known as the Metropolitan Commissioners in Lunacy.

The following is an abstract of their powers and duties, as presented by Dr. L. S. F. Winslow, in his *Lunacy Chart*. (See also *Fry on the Lunacy Acts*, pp. 36-143.)

DUTIES OF COMMISSIONERS.

Duties of Commissioners in Lunacy.—To grant licenses, visit and regulate asylums, report to the Lord Chancellor as to the condition of the same, and conduct and manage every thing connected with certified lunatics in England and Wales.

JURISDICTION OF COMMISSIONERS.

Jurisdiction of Commissioners.—The city of London, the city of Westminster, the county of Middlesex, the borough of Southwark.

The following places in the county of Surrey: Barnes, Camberwell (St. Giles), Dulwich, Battersea, Clapham (Christ Church), Graveney, Bermondsey (St. Mary Magdalene), Kennington, Brixton, Deptford (St. Paul's), Kew Green, Lambeth (St. Mary), Mortlake, Merton, Newington (St. Mary), Mitcham, Norwood, Peckham, Roehampton, Stockwell, Putney, Rotherhithe (St. Mary), Streatham, Wandsworth, Tooting, Wimbledon, Walworth.

The following places in the county of Kent: Blackheath, Greenwich, Charlton, Lee, Woolwich, Deptford, Lewisham.

The following places in the county of Essex: East Ham, Leytonstone, Plaistow, West Ham, Leyton, Low Leyton, Walhamstow, Southend.

And every other place (if any) within the distance of seven miles from any part of the cities of London and Westminster, or borough of Southwark.

The above-mentioned places are within the limits of the immediate jurisdiction of the Commissioners.

LICENSED HOUSES.

The License.—Every person receiving more than one insane patient into his house for profit must obtain a license. The charge for a license is ten shillings for every patient. The license is granted by the Commissioners in Lunacy to persons residing within their immediate jurisdiction on the first Wednesday in February, May,

July and November, and the application must be sent to the office at least fourteen days before the day appointed for granting the licenses. For houses beyond the jurisdiction of the Commissioners, it is granted by the justices at the Quarter Sessions. The time for which a license is granted is variable; the maximum time being thirteen months. All houses licensed after the passing of the Lunacy Act, 1845, are required to have the licensee resident in the house; but if more than one person is licensed, then only one of the licensees need reside on the premises. Asylums licensed after the passing of the before-mentioned act may have a medical superintendent who is not licensed as resident in the house, but he must be approved of by the Commissioners in Lunacy. More than one house may be included in the license.

Death or Incapacity of the Licensee.—The license may, with the consent of the Commissioners, be transferred to any other person in case of death or incapacity of the person licensed. Two persons being licensed, if one dies, the license is still valid with respect to the other person licensed.

Refusal to renew the License.—The Lord Chancellor is empowered, at the request of the Commissioners in Lunacy, to recall or refuse to renew any license.

PATIENTS IN LICENSED HOUSES.

1. *On the Admission of Patients into Licensed Houses.*—No person of unsound mind, or alleged to be so, can be received into a licensed house without an order and two medical certificates (one medical certificate is sufficient in cases of great emergency, but the special circumstances which prevent the two certificates being obtained must be stated in the statement).

Order for Admission.—The order is only valid for one month from its date. The following persons are prohibited from signing it. Any person who receives any percentage on, or is otherwise interested in, the payments made on behalf of the patient in the asylum; a medical man who is the proprietor or superintendent of the asylum to which the patient is sent, or who visits it as medical attendant; the father, son, brother, partner, or assistant of either of the medical men who sign the certificate. The person signing the order must have seen the patient within *one* month from signing.

Statement.—This need not be signed by the person who signed the order.

Medical Certificates.—These may be signed before or after the order and statement. They must not be signed by the father, brother, son, partner or assistant of the person having the care of the patient, or by any one receiving any percentage on, or otherwise interested in, the payments to be made, or by the person who signed, or whose father, brother, son, partner or assistant had signed the order; or by two persons who are in partnership or professionally connected. The medical men who certify must be in actual practice and registered. The certificates must be signed within *seven* clear days from the date of the examination of the alleged lunatic, and the patient can only be admitted within seven days from this examination. They may be

dated and signed any time between the examination and reception of the patient. (*)

All corrections and alterations in order and certificates must be initialed by the person who certified; fourteen days are allowed by the Commissioners for these amendments, if the documents are returned for correction. The patient must not be examined for certificate at the house or asylum in which it is proposed to place the patient.

The medical superintendent is required to transmit a copy of the documents upon which the patient has been received to the Commissioners within twenty-four hours from the admission into the asylum.

Statement of Mental and Bodily Health.—A statement of the mental and bodily condition must be sent to the Commissioners after the expiration of two and before the expiration of seven clear days from the admission, and the examination for the same must be made in this time.

2. *Discharge of Patients from Licensed Houses.*—A patient is discharged as *recovered, relieved or not improved*; the notice of discharge is sent by the medical superintendent within two clear days to the Commissioners. The person who signed the order can *alone* discharge a patient from the asylum, except under the following conditions: Absence from England, incapacity from insanity, or otherwise, from giving an order for the discharge. In these cases the husband or wife of such patient, if there be no husband or wife, the father or mother, and if there be no father or mother, the nearest of kin, or the person who made the last payment on account of the patient. The Commissioners in Lunacy have also the power to authorize the discharge of a patient.

On the discharge of a patient the usual entries are made by the medical superintendent in the discharge book, the admission book, and case book.

3. *Death of Patients in Licensed Houses.*—Notice of death must be sent by the superintendent of the asylum to

(1.) Commissioners in Lunacy within two clear days, and also to Visitors, if house is under their jurisdiction.

(2.) Coroner of district within two clear days.

(3.) Registrar of Deaths.

(4.) Person who signed the order for admission and to person mentioned in Statement.

Entry of death must be made in the same book as the '*Discharge*;' a copy of the notice as sent to the Commissioners must be entered in the case book, and a certified copy must be sent to the coroner.

4. *Escape of Patients from Licensed Houses.*—Notice of the escape and recapture of a patient must be sent to the Commissioners within two clear days, and must contain the name of the patient, the condition of mind at the time, and all the circumstances connected with it. Fourteen days are allowed for recapture, after which time the certificates are invalid.

5. *Visitation of Commissioners.*—All licensed houses within their immediate jurisdiction are visited by the Commissioners six times in the year. Four of these visits are made conjointly by a medical and

* Medical certificates signed in Scotland, Ireland, or the Channel Islands are not valid in England.

a legal commissioner, and two single visits are made by a legal commissioner. If beyond the immediate jurisdiction, twice annually.

6. *Temporary Leave of Absence.* — Application for leave of absence for a patient must be made in writing by the person who signed the order, or who made the last payment on account of such patient. This is forwarded to the Commissioners by the medical superintendent, who must state that such change would be beneficial to the patient, if such be the case.

7. *Transfer of Patients from one Licensed House to another.* — Application must be made to the Commissioners by the person who signed the order. The Commissioners, if satisfied, forward two copies of the "consent and order" to the applicant; the consent signed by two of the Commissioners, the order by the person making the application. One of these copies must be left at the house from which the patient is to be removed; the other, together with an exact copy of the original medical certificates, are sent with the patient to the house to which he is transferred. These certificates must be indorsed by the medical superintendent *as exact copies*.

8. *Books required to be kept.* —

1. Case Book. Entries to be made periodically.

2. Admission Book.

3. Discharge Book.

4. Medical Journal. Entries to be made once a week.

Books and documents examined by the Commissioners at the times of their visits: The four books mentioned above, together with the Visitors' Book and Patients' Book for the Commissioners' entries, and medical certificates. A copy of the entries must be forwarded to the Commissioners' office within three days from their visitation.

9. *Correspondence of Patients.* — All letters addressed to the Commissioners in Lunacy are forwarded by the medical superintendent unopened. Letters written by patients to their friends are forwarded, unless the medical superintendent disapproves. All letters *not sent* must be indorsed thus—*Not to be sent*, and initialed by the medical superintendent and placed before the Commissioners in Lunacy at the time of their visit.

10. *Attendants in Licensed Houses.* — A list of the attendants residing in the house on the 1st of January in every year must be sent to the Commissioners in Lunacy. This list must contain the age, time of engagement, wages, previous residence and occupation of each attendant. A record of attendants is kept by the Commissioners. Notice of discharge and the reason must be forwarded to the Board of Commissioners. Notice of engagement of each attendant must also be sent, containing wages, date of engagement, age and previous occupation. This refers only to Metropolitan licensed houses.

BOARDERS IN LICENSED HOUSES.

Boarders in Licensed Houses. — A boarder is a person who of his own free will places himself in an asylum; he is a free agent, and at liberty to leave when he chooses. He must have been a patient under certificate either in a licensed house, or as a single patient within five years from the time he wishes to become a boarder. Application in

writing is made by the person desirous of residing as a boarder to the Commissioners in Lunacy, who, if they think proper, will give their permission for a definite period in a form sent to the superintendent of the asylum.

SINGLE PATIENTS IN UNLICENSED HOUSES.

Single Patients in Unlicensed Houses.—No license required for one patient in a private house.

Admission into Private Houses.—"Medical certificates," "order" and "statement," similar to those used for private patients, must first be obtained and duly filled up; the "order" to be addressed to the person receiving the patient as *proprietor*, or to the attendant under whose care the patient is as *superintendent*. Copies of these documents must be sent to the Commissioners in Lunacy within twenty-four hours of the admission. The patient must be visited by a medical attendant once a fortnight, who is required to make entries in the medical visitation book. By special permission of the Commissioners, the visits may be made less frequently. A statement similar to that made in the case of a private patient is sent in to the Commissioners by the medical attendant. The examination preliminary to such statement is made after the expiration of two clear days, and before the expiration of seven clear days, from the admission of the patient, and this is sent to the Commissioners in Lunacy.

Death of Patient.—Notice must be forwarded to the Commissioners in Lunacy within two clear days, and also to the coroner and the registrar.

Discharge of Patient.—Notice must be sent to the Commissioners in Lunacy within forty-eight hours of such discharge.

Leave of Absence and Transfer.—The same as in the case of private patients.

Change of Residence.—Seven clear days' notice must be given to the Commissioners in Lunacy, and to the person who signed the order, previous to changing the residence of a single patient. This notice must contain the full address of the new residence.

Annual Medical Report.—The medical attendant is required to send to the Commissioners in Lunacy, on the 10th of January, or within seven days, a report of the mental and bodily condition of the patient and any other statements that appear necessary to be reported to the Board.

Visitation of Commissioners.—All single patients are visited at least once during the year.

PAUPER LUNATICS.

Admission of Pauper Lunatics into County Asylums.—A pauper is any one maintained wholly or in part at the expense of a parish, union, county, or borough. Information is required to be given to the medical officer of the parish or union in which the lunatic resides, that a person of unsound mind is resident in the parish.

The medical officer, upon receiving this information, is required within *three* clear days to give notice to the relieving officer of the parish that the lunatic is living therein. The relieving officer will, after

obtaining such information, give notice thereof to a justice of the county or borough within which such parish is situate, and an order is made by the justice for the lunatic to be brought before him. The justice will call in a medical man to examine the lunatic conjointly with him, and if satisfied as to the mental condition, an order will be signed by the justice and *one* medical certificate by the medical man, and upon these the patient can be legally received and detained in an asylum. In the event of a patient not being able to be brought before a justice, an officiating clergyman of the parish, in priest's orders, in conjunction with the relieving officer or overseers, may examine him, and, if satisfied, sign the order for admission.

If the patient cannot be received into the county asylum, he can be taken to the work-house, but no dangerous lunatic can be detained in a work-house beyond fourteen days.

The order and one medical certificate having been obtained, the relieving officer is required to arrange for the immediate removal of the patient to either a county asylum or work-house, or if, from deficiency of room or from any other cause, which must be clearly stated on the order for admission, this cannot be done, the patient must be taken to a private asylum in which pauper cases are received.

A *statement* similar to that required in case of private patients must be sent to Commissioners.

Discharge of Pauper Lunatics.—The discharge of a patient from a county asylum rests entirely with the Visitors. The medical officer of the asylum first having given his advice in writing in the matter, any two of the Visitors can authorize the discharge, and *without* the advice of the medical attendant three of the Visitors can discharge the patient.

Recovery of Pauper Lunatics.—Notice of the recovery of a pauper lunatic must be forwarded to the guardians or overseers of the parish, or, if the patient is chargeable to any county, to the clerk of the peace thereof; and if the patient is not removed within fourteen days from such notice, the Commissioners in Lunacy must be informed of such recovery.

Death of Pauper Lunatics.—Notice of death must be forwarded as in the case of private patients.

Visitation of County Asylums.—County asylums are visited at least once in every two months by two of the Visitors, and once during the year by the Commissioners in Lunacy. All medical certificates and official books are placed before them for inspection. The asylum books are similar to those kept in licensed houses.

Annual Reports.—The Committee of Visitors are required to place before the justices of the counties or borough in which the asylum is situated, every year, at the Court of the General or Quarter Sessions which is held after the twentieth of December, a full report of the condition of the asylum and every thing connected with it, and a copy of this report is transmitted to the Commissioners in Lunacy.

Copies of Notices.—Copies of medical certificates, discharge, and death to be sent as in cases of private lunatics in licensed houses.

CHANCERY LUNATICS.

Chancery Lunatics.—A Chancery patient is one who has been found

lunatic by inquisition — it being found necessary to place his property under the protection of the Crown.

Commissions in Lunacy.—There are two ways in dealing with the property of alleged lunatics —

(1) When the property exceeds £1,000, or income more than £50 per annum.

(2) When the property does not exceed £1,000, or the income is only £50 per annum.

Notice of Procedure.—In the first of these instances, a petition is presented to the Lord Chancellor by a solicitor, accompanied by affidavits from members of the alleged lunatic's family, and also medical affidavits. The case is heard before one of the Masters in Lunacy, either with or without a jury, in open court, and the Master, having heard evidence, will decide accordingly. In the second of these instances, the Lord Chancellor, having formed his opinion of the mental state of the patient from the affidavits placed before him, can give an order for the proper disposal of the property without ordering any inquiry.

Committees.—A person having been found lunatic by inquisition will have two persons appointed, one to manage his estate, the other to decide his residence; these are called respectively committee of estate and committee of person, and the appointment is in the hands of the Lord Chancellor.

Admission of Chancery Lunatics into Licensed Houses.—No medical certificates are necessary. An *order*, signed by the committee of the person, and having an office copy of such appointment annexed, is a *sufficient* authority for the reception into a licensed house.

Chancery Patients in Unlicensed Houses.—It is enacted that the person who undertakes the care of a Chancery patient for profit is subjected to the same responsibilities and duties as are enforced in the case of a private patient in an unlicensed house. The committee is not affected by this clause if he receives the lunatic into his own house. No certificates in either case are required, and the preliminaries for admission are similar to those required for Chancery lunatics into licensed houses. All Chancery lunatics are subject to visitation both by the Commissioners and Lord Chancellor's Visitors, but are not subject to the fortnightly medical visitation.

LUNATICS WANDERING AT LARGE.

Lunatics Wandering at Large.—A constable, relieving officer, or overseer, upon receiving information that a lunatic is wandering at large, is legally bound to take the lunatic before a magistrate. A medical man is called in, and upon one medical certificate being signed, the justice will give an order for the reception of the lunatic into an asylum or licensed house.

It is not within the intended scope of this chapter to follow in detail the history of English Lunacy Legislation. Most of its fruits are already represented in that of New York, with the additional advantages derived from the

more flexible system of procedure under which our statutes are applied in practice. It is but a step also from legislation to judicial determinations of that common law inherited from England, and in whose interpretation our courts have not disdained to be aided by those of Westminster Hall. Questions in the law of lunacy, whether arising in law or in equity, have, outside of statutory restrictions, been decided with great uniformity of opinion on both sides of the Atlantic, and in our own State the pages of Johnson and Paige, reflecting the dicta of Kent and Walworth, are a proper analogue to those of Ambler and Vesey, reflecting in like manner the wise teachings of Eldon, Erskine and Hardwicke.

CHAPTER SECOND.

LUNACY LEGISLATION IN NEW YORK.

In New York, as in the other colonies, so much of the English common law was adopted as was applicable to its condition. And the same rule, obtained in relation to the statute law of the mother country which, *ceteris paribus*, was in like manner applied to the government of the province. That this rule was founded, both in necessity as well as in reason, may be inferred from the language of the Constitution of 1777 (Art. 35th), which ordains that "such parts of the common law of England, and of the statute law of England and of Great Britain, and of the acts of the Legislature of the colony of New York as together did form the law of the said colony on the 19th day of April, in the year of our Lord 1775, should form the law of the State, subject to such alterations and provisions as the Legislature of the State should from time to time make concerning the same." Idiocy or Lunacy being under all forms of civilized governments a civil disqualification, the same laws which prevailed in England necessarily came into force in her colonies, wherever the legal status of the subject became a question for judicial determination, and we find accordingly, among our colonial laws, no special legislation relating to lunatics.

The first provision relating to the insane which is to be found in the statutes of New York occurs in section fifth of chap. 47 of the Laws of 1787, entitled

An Act to reduce the Laws concerning Wills into a Statute.

This act, which renders idiots and any person of unsane memory incapable of devising lands, closely follows, in its

distinctions between idiots and lunatics, the spirit of the Statute of 17 Edw. 2nd. Thus, in the case of idiots no allusion is made to them as possible householders having dependent families, or again, to the possibility of their recovery from such an infirmity; while in the case of lunatics both of these conditions are mentioned and provided for. The statute thus regards idiocy as an incurable infirmity *a nativitate*, while in the case of the lunatic it extends its protection over him and his estate only *dum fuit non compos mentis*. (1 *Griff.* 387; 2 *Jones & V.* 94.)

The next statute, which was in imitation of, and an almost complete re-enactment of the Statute of 17 Geo. 2, ch. 5, is

CHAP. 31, LAWS OF 1788.

An Act for apprehending and punishing disorderly persons.

Section 6 recites as follows, viz. :

Whereas, there are sometimes persons who, by lunacy or otherwise, are furiously mad, or are so far disordered in their senses that they may be dangerous to be permitted to go abroad; therefore, be it enacted that it shall and may be lawful for any two or more justices of the peace to cause such person to be apprehended and kept safely locked up in some secure place, and, if such justices shall find it necessary, to be there chained, if the last place of legal settlement be in such city, or in any town within such county; and if the last legal place of settlement of such person shall not be in such city or county, then such person shall be sent to the place of his or her last settlement," etc., etc. (2 *Griff.* 53; 1 *Radc.* 126.)

No legislation for the insane appears to have occurred during the twelve years succeeding the above act. Finally, in 1800, a case arose requiring the intervention of the Legislature in behalf of an insane person convicted of murder, and under sentence of death. The Governor not being at that time empowered to grant pardons in such cases, and there being no insane asylum in the State, within which the convict could be confined, the Legislature was the only tribunal to which an appeal could be taken for clemency. Accordingly the following act was passed to cover the case :

CHAP. 3, LAWS OF 1800.

An Act to pardon John Pastano for murder.

Whereas, John Pastano, at a Court of Oyer and Terminer, held in and for the city and county of New York, on the 19th day of November, 1799, was convicted of the murder of Mary Ann De Castro, and sentenced to be executed accordingly, which execution has been suspended by His Excellency the Governor until the 27th day of February inst.;

And *whereas* it appears satisfactorily to the Legislature, from the testimony submitted at and discovered since the trial of the said John Pastano, that at the time of the commission of the act aforesaid he was insane, and is therefore a proper object of mercy; therefore,

Be it enacted, etc., that the said John Pastano be and he is hereby fully and absolutely pardoned and discharged from the felony and conviction aforesaid, and all execution and forfeiture thereon.

Provided, nevertheless, that the said John Pastano shall continue confined in prison, until the assurance which has been made of security's being given that he shall be immediately sent to Madeira, where his connexions reside, shall be complied with to the satisfaction of the mayor or recorder of the city of New York.

CHAP. 9, LAWS OF 1801.

An Act to reduce the Laws concerning Wills into a Statute.

§ 5. No last will made by an idiot or person of insane memory shall be valid.

Chap. 47 of 1787, rendered persons of non-sane memory incapable of making a will affecting real property only, but leaving them still free to dispose of their personal estate. But by the act of 1801 all grades of *non compotes* were rendered absolutely intestable. These two statutes, therefore, may be said to have been the foundation upon which our present Revised Statutes, relating to the testamentary capacity of persons of non-sane memory and understanding, rest.

CHAP. 30, LAWS OF 1801.

An Act concerning Idiots, Lunatics and Infant Trustees.

§ 1 recites that the Chancellor shall have the care and provide for the safe-keeping of idiots and lunatics, and of their real and personal estates, and for their maintenance and that of their families out of their personal estate, and the rents and profits of their real estate respectively; and shall take care that the same be not wasted or destroyed. If the personal estate be insufficient, the Chancellor may order their real estate to be sold.

§ 4 recites that a partition of their lands held in common may be effected by their committee, with the approbation of the Chancellor. But no deed shall be executed therefor until the report of such committee shall have been confirmed.

§ 6 recites that the estate of any lunatic, in case of recovery, shall be restored to him, and in case of his death shall descend to his heirs.

The above statute is in imitation of the 17 Edw. 2, ch. 11, 12, and gives to the Chancellor the same power which in England was accorded to the Keeper of the Great Seal, as the King's *delegate pro hac vice*, and not by virtue of any powers originally vested in Chancery. (*Lives of the Lord Chancellors*, vol. 1, p. 14; See "*Wards & Liveries*," 4 *Reeve's Hist.* 259.)

CHAP. 54, LAWS OF 1806.

An Act for the better and more permanent support of the hospital in the city of New York.

Whereas it has become necessary, on account of the increasing number of patients in the hospital in the city of New York, to enlarge the same by erecting additions thereto for the more convenient accommodation of the sick and disabled, and particularly to provide suitable apartments for the maniacs, adapted to the various forms and degrees of insanity;

And whereas the said hospital is an institution of great public utility and humanity, as well as the general interests of the State require that fit and adequate provision should be made for the support of such an infirmary for sick and insane persons; therefore, the better to enable the governors of the said hospital, by means of a permanent fund, to maintain and improve the said hospital,

Be it enacted, etc., etc., "that the Treasurer of this State shall every year hereafter, until the year one thousand eight hundred and fifty-seven, upon the warrant of the Comptroller, pay to the treasurer of the Society of the Hospital, in the city of New York, in America, for the use of the said corporation, in quarter-yearly payments, out of any moneys in the treasury of this State not otherwise appropriated, the annual sum of twelve thousand five hundred dollars, the first quarterly payment to be made on the first day of May next, which said annual sum of twelve thousand five hundred dollars shall become chargeable upon the duties on sales at public auction in the said city of New York.

"And be it further enacted, that the act entitled An Act to continue the provision for the public hospital in the city of New York, passed March 2nd, 1805, be, and the same is hereby repealed.

"And be it further enacted, that the governors of the said hospital shall make an annual report of the state of that institution to the Legislature."

CHAP. 90, LAWS OF 1809.

An Act to amend the Act entitled an Act for the settlement and relief of the Poor.

§ 3 recites, "That it shall and may be lawful for the overseers of the poor of any city or town, by and with the consent of the common council of such city, or of two justices of the peace of the county in which such town shall be, whenever any poor person legally settled in such city or town and maintained at the public charge, who was, or shall become lunatic or insane, to contract with the governors of the New York hospital, in the city of New York, for the maintenance and care of such lunatic on such terms as they may deem meet, and to transport such lunatic to the said hospital; and all such sums so agreed on for the maintenance of such lunatic shall be regularly paid to the governors of the said hospital by the overseers of the poor of such city or town and their successors in office.

"And it shall be the duty of the overseers of the poor of such city or town to enter in the poor books kept by them the name of such lunatic, the weekly or other sum or sums agreed to be paid to the governors of the said hospital for his or her support, and the cost and charges of his or her removal to and from the said hospital in the like manner as is required by the fifth section of the said act for the settlement and relief of the poor.

"Provided that the settlement of such lunatic so removed to the said hospital shall remain the same as before his or her removal; and that it shall not be lawful for the overseers of the poor of any such city or town to remove to the said hospital idiots or other poor persons who are not lunatic or insane."

This is the first legislative enactment in this State making provision for the pauper insane as a distinct class entitled to care and medical treatment in a special hospital. (See *New York County*.)

The following is another of those cases of homicide committed by an insane person where the pardoning power of the Legislature was invoked:

CHAP. 4, LAWS OF 1816.

Whereas Daniel Northrup was, in the month of September last, at a Court of Oyer and Terminer in the county of Saratoga, convicted of the murder of Cornelius Allen, and is now under sentence of death;

And *whereas* the presiding judge hath reported that there is so much doubt of the sanity of the said Daniel at the time of the commission of the crime, that he ought not to be executed, and the judge also reporting that the insanity of the said Daniel renders it unfit that he should be confined in the State prison; and that he has friends who

are willing at their own expense to provide for his own support in some suitable asylum ; therefore,

Be it enacted, that the execution of the said Daniel Northrup on the conviction aforesaid shall be suspended until the first day of March next, and if before such time the friends or relatives of the said Daniel shall comply with the provisions hereinafter contained, the said Daniel shall thereupon be held to be fully and absolutely pardoned for the offense aforesaid.

And be it further enacted, that if any one or more of the friends or relatives of the said Daniel shall, prior to the said first day of March, procure a situation for him in some lunatic hospital or asylum, which the person administering the government of this State shall approve of, and give bonds to the People of this State, in such sum and with such security as shall be satisfactory to the Comptroller of this State, with condition forthwith to convey the said Daniel to such hospital or asylum, and to keep and maintain the said Daniel at such hospital or asylum until he shall be therefrom discharged by permission of the Executive of this State, the first or senior judge of the county of Saratoga shall thereupon, by warrant under his hand, order the sheriff of the said county to deliver the said Daniel to some proper person to be named in such order, to be conveyed to such hospital or asylum, and the said bond and warrant shall be filed with the Comptroller, and be deemed to all intents and purposes matters of record in his office. (*Vide, also, case of William Kirby, chap. 76, Laws of 1824.*)

The Revised Laws of 1813, vol. 1, p. 116, § 6, include chap. 31 of the Laws of 1788 (heretofore noticed), relating *inter alia* to the personal care and custody of the insane, and also chap. 30 of the Laws of 1801, relating to the estates of idiots and lunatics (*page 147*).

CHAP. 203, LAWS OF 1816.

An Act to enable the Society of the New York Hospital to erect a new building for the accommodation of insane patients.

This statute is supplemental to chap. 54 of the Laws of 1806, and enacts that a yearly sum of \$10,000 be paid to this society for the purposes mentioned in the title. This and the former annuity of \$12,500 were continued until 1866, with an omission between 1860 and 1866. The whole amount in the aggregate to \$1,279,229.17. (See full act in *Special Acts*.)

CHAP. 32, LAWS OF 1817.

An Act to amend the Act entitled "An Act concerning Idiots, Lunatics and Infant Trustees."

CHAP. 109, LAWS OF 1821.

An Act concerning the Estates of Habitual Drunkards.

This act assimilates drunkards to lunatics, and gives to the Chancellor control over their estates and persons.

CHAP. 135, LAWS OF 1822.

An Act amendatory of the preceding Act.

CHAP. 294, LAWS OF 1827.

An Act concerning Lunatics.

§§ 2, 3 and 4 recite that "no lunatic shall be confined in any prison, gaol or house of correction, or confined in the same room with any person charged with, or convicted of, any criminal offense. But he shall be sent to the asylum in New York, or to the county poor-house or alms-house, or other place provided for the reception of lunatics by the county superintendents."

§ 5 recites that it shall be the duty of the parents or relatives of any lunatic, if able, to support him in such asylum, with this proviso, viz.: "That no relative shall be liable as aforesaid, who shall at his, or her own, costs and charges, provide a suitable place for the confinement of such lunatic, and shall confine and maintain such lunatic in such manner as shall be approved by the overseers of the poor of the town, and in such case it shall not be lawful to remove such lunatic from the custody of his or her relatives, who shall so provide for such lunatic or mad person."

§§ 2, 3 and 4 of this act are re-enacted in the first compilation of the Revised Statutes (1 *R. S.*, pp. 634-635). Section fifth is amended by omitting the portion quoted above.

The first edition of the Revised Statutes, printed in

1829, in Tit. 3, chap. 20, Part 1 (*Vol. 1, p. 633*), collates all preceding general statutes relating to the safe-keeping and care of lunatics. That title contains fourteen sections. It is followed by Tit. 4, which treats of the care of habitual drunkards, who, by chap. 109 of the Laws of 1821, and chap. 135 of the Laws of 1822, are assimilated to the insane, after office found, in relation to disfranchisement.

In Tit. 2, chap. 5, Part 2d (*Vol. 2, p. 51*), the laws relating to the care of the estates of lunatics and drunkards are in like manner collated. This title contains twenty-five sections.

The great want at this time felt of some State asylum for the insane, led to the legislative efforts represented in the following events and statutes:

In January, 1830, Gov. Throop, in his annual message to the Legislature, called its attention to the uncared for condition of the pauper insane. In a few pointed sentences he drew a picture of the privations and neglect to which these persons were subjected under poor-house regulations, and concluded by saying that "no restoration can be hoped for under such circumstances; indeed the instances are not rare of persons slightly deranged becoming incurable maniacs by these injudicious means." (*Assembly Doc. 2, Jan. 7, 1830.*) Moved by these unanswerable arguments in favor of State intervention, the Assembly soon after adopted a resolution "that the standing committee on charitable institutions do inquire into the propriety of making further provision for ameliorating the condition of the insane poor." (*Assembly Journal, January 29, 1830.*)

As a result of the labors of this committee and upon their recommendation, a special committee was "appointed for the purpose of investigating the manner in which the hospital in the city of New York, and the asylum connected therewith, have disbursed the funds which they have received from the State; and that said committee inquire particularly into the management, affairs, and prospects of

said establishment, the receipts and disbursements, and the propriety of making a different distribution of the funds now applied to their use, or of increasing such funds; and that they digest a system for the general and more economical distribution of such public charity; also the propriety or necessity of erecting new establishments, more extensively to distribute such charities; the proper site for such new erection, if any should be found necessary, with a plan of the same, and an estimate of the probable expense, also the propriety of requiring the physicians of said asylum to be appointed by the Governor and Senate; and that they report the result of their doings to the next Legislature." (*Assembly Doc. No. 408, April 14, 1830.*)

The report of this special committee consisting of Messrs. A. C. Paige, Eli Savage and Peter Gansevoort, was not made until the next session. (*Assembly Doc. No. 263, March 10, 1831.*) A whole year was devoted to its preparation, and it exhibits a range of thought upon the causation of insanity, an acquaintance with its status in this and other countries, and a practical appreciation of the needs of the insane and of the duties of the State toward them, which is most highly creditable to the committee, and renders the document one of a rare and exceptional character in the history of our lunacy legislation.

Adverting to the inadequate provision then made for the pauper insane throughout the State, and after reviewing their number under the light of the last census, the committee then say:

"To accommodate these 2,695 persons, we have but one incorporated asylum, at Bloomingdale, containing provision for about 200 patients, and one private asylum at Hudson, containing accommodations for 50 patients, and established during the past summer by Dr. S. White. And these establishments are only for pay patients, and are inadequate to accommodate even those whose relatives are able to sustain the expense of their maintenance and treat-

ment at a public or private hospital. At neither of these institutions is there any provision for pauper lunatics.

There was a law passed on March 24, 1807, by which the overseers of the poor of any city or town were authorized to contract with the governors of the New York Hospital for the care and maintenance of pauper lunatics. And the governors of the hospital have, since the passage of this law, resolved to admit paupers into their asylum at the moderate price of two dollars a week. But the admission of paupers into the Bloomingdale Asylum is entirely optional with and not compulsory upon the governors of the New York Hospital, and but very few towns have, under the authority of this law, sent their pauper lunatics to this establishment. It must then be a conceded fact that there exists no provision whatever in this State for the comfortable support and the proper treatment of the insane poor."

During the session of 1831 a special committee was again appointed upon this subject, who made their report on April 4th, 1831 (*Assembly Doc. No. 305*), but no legislative action was had upon it. On the 1st of April, 1831, a memorial was addressed to the Legislature by Dr. Samuel White, superintendent of the Hudson Lunatic Asylum, praying for a subsidy in aid of that institution. (*Assembly Doc. No. 305.*) The special committee on the subject of lunacy legislation for that year, in their report, speak in high terms of this asylum, and recommend that supervisors of counties make contracts for the care of the insane with Dr. White; but being a private enterprise, they do not advise any subsidy in its aid on the part of the State. Despite the very stirring reports of committees, and the general unanimity of opinion upon a subject which required no further discussion, it is inexplicable how this failure to act on the part of the Legislature could have occurred. We shall presently see that it was destined to be delayed for several years more. Such is the uncertainty with which

the law-making power often responds to the claims of the common weal.

In 1832 Gov. Throop in his annual message again reverted to the condition of the pauper insane as one calling for State intervention. (*Assembly Doc. No. 2, Jan. 3, 1832.*) He referred to his former message, and pressed the subject with great emphasis upon the attention of the Legislature. A special committee, as in former years, was appointed to inquire into the same, who reported on Feb. 28, 1832, in favor of making State provision for the insane. (*Assembly Doc. No. 174.*) Accompanying their report was a bill, but no further action was taken in the premises, and the Legislature again adjourned, leaving the pauper insane still uncared for.

In January, 1834, Gov. Marcy again recalled the matter to the notice of the Legislature, making an earnest appeal in behalf of the insane poor, and using language similar to that of Gov. Throop. No appeal could be stronger, or better sustained by argumentative proofs, than was his. In this communication he pointed out that there was but one insane asylum in the State, that at Bloomingdale, where paupers could be admitted; that it was inadequate to the public wants, and was in fact closed to that class of patients presenting the strongest claims upon the public bounty, meaning those who were unable to contribute to their own maintenance. The following is the language used by him:

"The asylum at Bloomingdale, under the management of the governors of the New York hospital, is the only establishment affording accommodations for insane patients which has received any assistance from the public treasury. The State has already paid for founding and supporting it one hundred and seventy thousand dollars, and has made provision for an annual payment toward its support of ten thousand dollars, until the year 1857. It is, however, inadequate to the public wants; besides, this institution is in effect closed to that class of insane patients presenting

the strongest claims for your bounty, to those who are unable to contribute to their own maintenance." (*Assembly Doc. No. 3, Jan. 7, 1834.*)

A special committee was again appointed, who, in their report, re-affirmed the views and suggestions of preceding inquirers, but no other legislation followed. (*Assembly Doc. No. 347, March 29, 1834.*) In 1835 the same programme was essentially repeated, and with the same results. (*Assembly Doc. No. 167, Jan. 31, 1835.*) In 1836 a memorial was presented to the Legislature from the State Medical Society, praying for the erection of a suitable State asylum for the insane. This memorial originated in a petition from the Oneida County Medical Society, addressed to the Legislature, and at the meeting which adopted it a resolution was passed, inviting the co-operation of the State Society. The memorial above alluded to was the result of this appeal. (See *Twenty-Fifth Annual Report of the Managers of the State Lunatic Asylum at Utica, for the year 1867, pp. 50-1.*)

This memorial seems to have finally accomplished the long-desired object. And in March, 1836, the official foundation of the first State lunatic asylum, in New York, may be said to have been laid by the following act:

CHAP. 82, LAWS OF 1836.

An Act to authorize the establishment of the New York State Lunatic Asylum.

CHAP. 218, LAWS OF 1837.

Amends § 4, Tit. 3, ch. 20, pt. 1, R. S. (1 *R. S.* 634).

CHAP. 218, LAWS OF 1838.

An Act to amend Tit. 3, Ch. 20, Part 1, of the Revised Statutes, entitled of the Safe-keeping and care of Lunatics.

CHAP. 310, LAWS OF 1839.

An Act to provide for the building of the New York State Lunatic Asylum.

Appropriates \$75,000 to finishing the main building, grading and covering foundations of other portions.

CHAP. 304, LAWS OF 1840.

An Act in relation to the State Lunatic Asylum.

This act appropriates \$75,000 toward its construction.

CHAP. 109, LAWS OF 1841.

An Act in relation to the State Lunatic Asylum.

This act further appropriates \$75,000 toward its construction.

CHAP. 278, LAWS OF 1841.

An Act in relation to the State Lunatic Asylum.

This act appoints five trustees, and makes it their duty, by section second, to *visit all institutions for the care of the insane in this and other States*, and to report upon a plan for the organization and government of the State Lunatic Asylum.

CHAP. 135, LAWS OF 1842.

An Act to organize the State Lunatic Asylum.

This act not only organizes the asylum, but revises and amends antecedent statutes relating to the safe-keeping of lunatics and their estates. (See *Title 3, infra.*)

CHAP. 224, LAWS OF 1843.

An Act in relation to the State Lunatic Asylum.

CHAP. 203, LAWS OF 1843.

This act authorizes the treasurer of Kings county to borrow six thousand dollars for the purpose of erecting a new lunatic asylum on the county farm at Flatbush.

CHAP. 337, LAWS OF 1844.

An Act in relation to the State Lunatic Asylum.

Both the foregoing acts are amendatory of existing provisions.

CHAP. 112, LAWS OF 1845.

An Act in relation to the powers of Receivers and Committees of Lunatics and Habitual Drunkards.

This is a very important act, and changed the old rule of procedure in relation to suits instituted in behalf of or against lunatics having committees. Previous to its enactment, the name of the lunatic had to be joined in every action to that of the committee. This act empowers committees to sue and defend in their own names. (See *Suits for and against Lunatics.*)

CHAP. 357, LAWS OF 1845.

An Act relating to insane persons in the county of Kings.
(See *Special Acts, Kings county.*)

CHAP. 328, LAWS OF 1847.

An Act to amend Tit. 1, Ch. 1, Pt. 4 of the Revised Statutes, relating to "Crimes and their Punishments."

§ 3 recites that when a convict under sentence of death becomes insane, the sheriff may empanel a jury and try the fact.

CHAP. 294, LAWS OF 1848.

An Act to amend the Act for the better regulation of county and State prisons.

§ 96. Amended so that whenever any convict becomes insane it is made the duty of the Prison Inspector to inquire into the same, and if satisfied of the fact, to transfer such convict to the State Lunatic Asylum.

§ 99. If such convict remains insane at the expiration of his term of sentence, the superintendent of the asylum

may return him to the charge of the superintendent of the poor of the county whence he came.

CHAP. 350, LAWS OF 1849.

§ 3 enacts that if any emigrant passenger is found to be idiotic or insane on landing, the owner or consignee of the vessel must give bonds to the People of the State, indemnifying them for the care and support of such person.

CHAP. 282, LAWS OF 1850.

An Act in relation to the State Lunatic Asylum.

§ 1 authorizes managers to employ a third assistant physician.

§ 2 recites that no person in indigent circumstances, not a pauper, shall be admitted into the asylum, unless such person shall have become insane within one year next preceding such admission, and county judge must take proofs of the same.

§ 3 authorizes managers to purchase the library, then at the asylum of the late Dr. Amariah Brigham, at a cost not to exceed fifteen hundred dollars.

§ 4 appropriates five thousand dollars for the purchase of furniture.

CHAP. 351, LAWS OF 1851.

Authorizes the treasurer of Kings county to borrow fifty thousand dollars to erect a new lunatic asylum.

CHAP. 446, LAWS OF 1851.

An Act to amend an Act entitled An Act to organize the State Lunatic Asylum, and more effectually to provide for the care, maintenance and recovery of the insane, passed April 7, 1842.

§ 1 gives the county judge of each county the power to send all indigent lunatics as may be brought before him, either to the county poor-house, or to the State Lunatic

Asylum, as, in his judgment, may be for the best interests of all concerned.

CHAP. 502, LAWS OF 1851.

An Act to establish an Asylum for Idiots, and making an appropriation therefor.

§ 1 authorizes the trustees to procure a suitable building for the education of such idiots as may be selected by such trustees, not exceeding twenty, and to employ all necessary teachers, keepers and assistants.

The said idiots are to be selected from those whose parents or guardians are unable to provide for their support, some from each of the judicial districts of the State, and the trustees are further authorized to receive such additional number of idiots as could be conveniently taken on such terms as they, the trustees, might deem just.

This is the first, and as yet the only State institution for idiots. New York has the only county asylum of that kind.

CHAP. 255, LAWS OF 1853.

Authorizes the treasurer of Kings county to borrow fifty thousand dollars on the credit of the county, to complete and furnish the lunatic asylum on the county farm at Flatbush.

CHAP. 92, LAWS OF 1855.

Authorizes the treasurer of Kings county to borrow thirty-five thousand dollars to erect a new lunatic asylum.

CHAP. 456, LAWS OF 1855.

An Act to provide for Insane Criminals.

The steady increase in the number of the insane discovered among criminals in our prisons, and the impossibility of affording them suitable treatment in the hospitals attached to such institutions led to the passage of the above act. In this, the first effort at a more systematic classification of the insane, and the establishment of a distinction between

criminals, and those not so in relation to their domestication in asylums, the duty was thereupon assigned the Inspectors of State prisons, of providing in some one of our prisons for the safe-keeping and care of insane convicts, and of causing their removal from the State Lunatic Asylum at Utica to the place thus provided for them. It being found impracticable to carry this project into operation, and nothing short of a separate building, with an administration of its own, sufficing for the purposes in contemplation, the Legislature accordingly passed an act organizing a special asylum in 1858.

CHAP. 650, LAWS OF 1857.

An Act to amend the Acts in relation to the State Lunatic Asylum, and to confer certain powers upon justices of the Sessions.

§ 2 recites that where a county judge shall be related by consanguinity or affinity to any indigent insane person, for whom admission is sought in the State Lunatic Asylum, the justices of the Sessions shall adjudicate the case instead of such county judge.

CHAP. 787, LAWS OF 1857.

(General Appropriation Bill) — appropriates as follows, *inter alia* :

“To the Marshall Infirmary of the city of Troy, and to the lunatic asylum built and established by the city and county of Albany, the sum of two thousand dollars each, provided that said institutions shall each arrange for the reception and treatment of twelve pauper lunatics, other than from the counties of Rennsselaer and Albany, upon the same terms upon which such patients are received at the State Lunatic Asylum at Utica.”

CHAP. 130, LAWS OF 1858.

An Act to organize the State Lunatic Asylum for Insane Convicts.

§ 1. The building now being erected on the prison grounds at Auburn shall be known and designated as the State Lunatic Asylum for Insane Convicts.

CHAP. 298, LAWS OF 1860:

An Act in relation to an insane asylum connected with the poor-house in the county of Genesee, and to enable the superintendent of the poor of said county to maintain actions and recover pay for the care, maintenance and medical treatment of insane persons at such asylum.

CHAP. 101, LAWS OF 1862, AND CHAP. 161, LAWS OF 1863.

Both these acts relate to the support and custody of indigent insane persons of the county of Genesee.

The title of this second act (1862) was amended by chap. 161, Laws of 1863, by omitting the adjective *indigent*, before the word "insane," and changing the preposition "*of*" to "*in*," before the words "the county," so as to read as follows: "An act in relation to the support and custody of insane persons in the county of Genesee."

This act empowered the superintendents of the poor to receive into the asylum connected with the poor-house all indigent insane persons then confined in the State Lunatic Asylum, and all those criminal lunatics who might be sent there pursuant to § 32 of chap. 135 of the Laws of 1842. It also empowered the county judge, in like manner, to order any indigent lunatic, not a pauper, or any other lunatic brought before him under chap. 20, Tit. 3, Art. 2, Part 1 of the Revised Statutes, to be sent to the said asylum connected with the poor-house, to be there retained until restored to reason or discharged according to law. (See *Genesee County in Special Acts*.)

CHAP. 221, LAWS OF 1860.

Authorizes the treasurer of Kings county to borrow fifty thousand dollars on the credit of the county to erect an addition to the county lunatic asylum at Flatbush.

CHAP. 82, LAWS OF 1863.

An Act separating the insane asylum of the county of Monroe from the poor-house of said county, and vesting in

the board of supervisors of said county full control, management and superintendence thereof.

CHAP. 139, LAWS OF 1863.

An Act to amend the Act organizing the State Lunatic Asylum for Insane Convicts, passed April 8, 1858.

Recites duties of prison physicians toward insane convicts and methods of admitting and discharging them from this asylum.

CHAP. 417, LAWS OF 1864.

An Act to provide for the sale and conveyance of any interest in real estate belonging to lunatics.

This act, taken in connection with chap. 112, Laws of 1845, completes the sphere of authority given to committees of lunatics to dispose of the interests of their wards by valid conveyances in their own names, when made under the order of a competent tribunal. (See *Suits on behalf of Lunatics*.) It is supplemented by chap. 37, Laws of 1870, extending its operations to estates of *idiots* and persons of unsound mind.

CHAP. 418, LAWS OF 1864.

An Act in relation to insane persons in poor-houses, insane asylums, and other institutions in the State of New York.

This act was intended to obtain statistics of the insane, for the purpose of determining the expediency of organizing a special asylum for the chronic insane. The result of the report made was the establishment of the Willard Asylum.

CHAP. 342, LAWS OF 1865.

An Act to authorize the establishment of a State asylum for the chronic insane, and for the better care of the insane poor, to be known as the Willard Asylum.

This act was intended for the purpose of removing from the county poor-houses all the chronic insane, and afford-

ing them such medical care and supervision as they could not obtain in these places.

§ 10 requires that all the chronic pauper insane from the poor-houses, and all those discharged not recovered from the State Lunatic Asylum, should be sent to this asylum.

§ 11 defines a *chronic* lunatic, by reciting that county judges and superintendents of the poor in every county of the State, except those counties having asylums for the insane, to which they are now authorized to send such insane patients by special legislative enactments, are hereby required to send all indigent or pauper insane coming under their jurisdiction, *who shall have been insane less than one year, to the State Lunatic Asylum.*

The above act marks an era in our lunacy legislation which merits explanation. At the time of the organization of the Willard Asylum, there was but one State asylum for the insane in New York. That one, situated at Utica, had been in operation since 1842. In this period of twenty years the natural accumulation of the chronic class within its walls would soon have closed it against fresh admissions of recent cases, had not the statute empowered the board of managers to return either to the poor-houses, or to the custody of relatives or friends such harmless and manifestly incurable cases as hospital treatment did not seem likely to benefit. The following is the language of the statute as now amended and in force.

The managers, upon the superintendent's certificate of complete recovery, may discharge any patient, except one under a criminal charge or liable to be remanded to prison; and they may discharge any patient admitted as "dangerous," or any patient sent to the asylum by the superintendent or overseers of the poor, or by the (first) judge of a county, upon the superintendent's certificate that he or she is harmless and will probably continue so, and not likely to be improved by the further treatment in the asylum, or when the asylum is full, upon a like certificate that he or she is manifestly incurable and can probably be rendered comfortable at the poor-house; so that the preference may be given, in the admission of patients, to recent cases, or cases of insanity of not over one year's duration. They may discharge and deliver any patient, except one under criminal charge

as aforesaid, to his relatives or friends, who will undertake with good and approved sureties for his peaceable behavior, safe custody and comfortable maintenance, without further public charge. And the bond of such sureties shall be approved by the county judge of the county from which said patient was sent, and filed in the county clerk's office of said county. Upon the presentation of a certified copy thereof, the managers may discharge such patient.

§ 41, chap. 135, Laws of 1842, as amended by § 6, chap. 337, Laws of 1844, and re-enacted by chap. 446, Laws of 1874.

It soon became apparent that the insane, when received into poor-houses, were treated as ordinary paupers, the character of their malady being ignored, and the physiological and moral supervision in dietary, shelter, clothing, and separation of the sexes, so indispensable to their well-being and safety receiving no attention whatever. They were simply herded like so many animals among the more practically useful paupers who, in return for their intelligence and manual labor, were made the standard upon which the administration of the house rested. In other words, the insane were pauperized in dietary and surroundings, and though helpless in their ability to attend to their personal wants were left to the chance care of a brother pauper, or, when too filthy for that, became objects of disgust and aversion, to be thrust like any thing else offensive into dark and out of the way places. It is only a highly cultivated humanity, or one moved by strong material inducements, which can patiently attend day after day upon an unsympathetic, filthy and demented stranger, whose presence is offensive to more senses than one, and a disturber of the moral order of the household. Multiply this stranger into twenty of both sexes, and it is not difficult to infer what their position and treatment would be in an ordinary poor-house.

The memorial of Miss Dorothy L. Dix to the Legislature and the report subsequently made by Dr. S. D. Willard (under chap. 418, Laws of 1864), and contained in Assembly Doc. No. 19, Session of 1865, created such a tide of public unanimity upon the necessity of ameliorating

the condition of the chronic insane, that an act was immediately passed organizing the Willard Asylum for their exclusive accommodation. The county authorities, who had always cared for the insane on the basis of cheapness alone, acquiesced in the movement to relieve them of this burthen, as long only as the rate of board at the asylum was kept at a figure so low that, while possible in a poor-house, it was impossible in an institution equipped and officered and administered as a medical hospital and not simply as a custodial retreat. By section nine of the organic act of this asylum, it was enacted that "Said trustees shall also fix the rate per week, *not exceeding two dollars*, for the board of patients."

Now at the time this act was passed, the sum of two dollars as a maximum for the weekly support of an insane patient, as he should be supported in a medical institution, was only about two-thirds the actual cost of such maintenance, in consequence of which the price had inevitably to be raised to three dollars. It has now fallen (1876) to \$2.78, exclusive of clothing.

As soon as this occurred, the asylum meanwhile being filled as fast as new sections were opened, and an occasional announcement being made that all available space was occupied and applicants must await the construction of additional groups of buildings, as soon as these things occurred, the counties found in them an opportunity to recover the lost right of caring for their own chronic insane. Accordingly, in 1871, an act was passed (chap. 713) giving the counties the right to resume the care of their chronic insane, on satisfying the Board of State Commissioners of Public Charities of their ability to maintain them properly. The following is the language of the statute :

The Board of State Commissioners of Public Charities are hereby authorized to hear and determine all applications which may be made to them in writing, by the county superintendents of the poor of the several counties of this State, for exemption from the operation of the tenth section of the act entitled "An act to authorize the estab-

lishment of a State asylum for the chronic insane, and for the better care of the insane poor," to be known as "The Willard Asylum for the Insane," passed April eighth, eighteen hundred and sixty-five. And whenever said Board on such application shall determine that the buildings and means employed to take care of the chronic pauper insane of such county are sufficient and proper for the time being for such purpose, and shall file the same in the office of the clerk of the county making such application, then and in that case, and until such determination shall be revoked as hereinafter mentioned and provided, the county superintendents of the poor of such county shall be relieved from sending the chronic pauper insane of such county to the Willard Asylum for the Insane, as now provided by law. Said Board may at any time revoke such determination, but such revocation must be made in writing and filed in the county clerk's office of the county making such application, and notice thereof shall be given in writing to the county superintendents of the poor of such county, and upon the filing of the same the said county superintendents of the poor of such county shall from thenceforward be again subject to the provisions and operations of the said act. (§ 1, *ch.* 713, 1871.)

Under this act a number of counties have received the coveted exemption, and are now conducting, in an imperfect way, asylums of their own, appurtenant to their poor-houses. These asylums are not what they should be, because in some of these exempted counties the number of patients is small and would not warrant a fully equipped asylum with a resident physician and paid attendants. They are like those feeble, abortive attempts at independent housekeeping among the poor, which tend, by a law of natural and moral gravitation, to squalor and unthrift. But they satisfy the local pride or the political economy of the county authorities, and as their aim is to reduce the taxes, they necessarily claim the support of the wearied tax payers in these efforts at floating the public debt. Not content, however, with the channel of exemption opened them by the act of 1871, several counties have this year overleaped the barrier of the State Board of Charities and obtained directly from the Legislature, permission to care, not only for their own chronic and indigent insane, but to take those of other counties. In this way the State has again changed its policy in regard to the care of the chronic insane. It is to be hoped that its next step will not be to permit the counties to enter into rivalry with its own asylums in car-

ing for the recent and acute cases of insanity. The better way out of this problem would be to place all State Lunatic Asylums, other than the criminal, upon a similar foundation, adding, wherever needed, suitable buildings for the retention of the chronic class under the same administration which received them in, and conducted them through, the acute stages of their insanity.

CHAP. 93, LAWS OF 1867.

An Act to establish and organize the Hudson River State Hospital for the Insane.

This institution was first organized and opened as a district hospital embracing twenty-two of the eastern-most counties of the State. This distinction was subsequently annulled by § 3 of chap. 264, Laws of 1875, and it is now, like every other State asylum, open to patients from any county.

CHAP. 546, LAWS OF 1867.

Authorizes the treasurer of Kings county to borrow one hundred and thirty-five thousand dollars to make an addition to the lunatic asylum at Flatbush.

CHAP. 843, LAWS OF 1867.

An Act to incorporate the Inebriates' Home for Kings county.

CHAP. 483, LAWS OF 1868.

An Act to amend the Act to incorporate the Inebriates' Home for Kings county.

CHAP. 56, LAWS OF 1869.

An Act to provide additional buildings for lunatics in the city of New York.

CHAP. 895, LAWS OF 1869.

An Act to provide for the safe custody and care of insane criminals, and repealing certain provisions of law relating to the expiration of sentences.

CHAP. 37, LAWS OF 1870.

An Act to amend an Act entitled an "Act to provide for the sale and conveyance of any interest in real estate belonging to lunatics," passed April 30, 1864 (chap. 417 of 1864).

This act was intended to cure an omission in the act of 1864, by extending its operations to the estates of *idiots and persons of unsound mind*, as well as to those of lunatics.

CHAP. 120, LAWS OF 1870.

An Act in addition to an act entitled "An act to provide additional buildings for lunatics in the city of New York."

CHAP. 378, LAWS OF 1870.

An Act to establish and organize the Buffalo State Asylum for the Insane.

This institution is now in process of construction, and not yet capable of receiving any patients.

CHAP. 474, LAWS OF 1870.

An Act to establish a homœopathic asylum for the insane at Middletown, New York.

This is the first attempt made in the United States to establish an insane asylum on the basis of the homœopathic system of medicine. It was organized by the aid of private contributions, the State making its own subsidy of \$150,000 conditional upon the raising of a similar sum in advance by individual enterprise.

CHAP. 492, LAWS OF 1870. (Appropriation Bill.)

In this act permission was given the trustees of the Willard Asylum to remodel the old Agricultural College building for the use of the insane or *idiots*.

CHAP. 633, LAWS OF 1870.

An Act in relation to the maintenance of the pauper insane in Monroe county.

CHAP. 704, LAWS OF 1870.

This act authorizes the Commissioners of the Land Office to take steps to protect the interests of the State in the Inebriate Asylum at Binghamton.

CHAP. 514, LAWS OF 1871.

This act amends the charter of the Inebriates' Home for Kings county.

CHAP. 666, LAWS OF 1871.

An Act to authorize judicial inquiry as to the sanity of persons indicted for capital offenses.

CHAP. 713, LAWS OF 1871.

An Act in relation to the chronic pauper insane.

This act authorizes the State Board of Charities to exempt counties from the operation of § 10 of the Willard Asylum act.

CHAP. 935, LAWS OF 1871.

This act amends the charter of the Inebriate Asylum at Binghamton.

CHAP. 322, LAWS OF 1872.

An act to discharge William Hoffman from the debtors' jail in the city of New York, commonly called Ludlow Street jail, and to discharge him from arrest and imprisonment under the orders of arrest, by virtue of which he is now imprisoned in said jail, and to exonerate his person from any existing or future arrest or imprisonment on any civil process in any civil action issuing out of any court of law, or on any execution issuing on any judgment rendered, or to be rendered, in any such action, in every case in which the cause of action arose since January first, 1871, and existed at the time of the passage of this act.

The reason for the passage of this act is explained in the last sentence of the first section as follows: "The said Hoffman being a bankrupt and a lunatic, and there being no legal process by which said Hoffman can be discharged from said imprisonment."

CHAP. 687, LAWS OF 1872.

This act provides means for the support and government of the Inebriates' Home for Kings county.

CHAP. 732, LAWS OF 1872 (Appropriation Bill).

This act gives certain powers to the Commissioners of the Land Office at the Inebriate Asylum at Binghamton.

CHAP. 571, LAWS OF 1873.

An Act further to define the powers and duties of the Board of State Commissioners of Public Charities, and to change the name of the Board to the State Board of Charities.

§ 9 requires licenses for private asylums from this Board.

§ 13 creates the office of State Commissioner in Lunacy

The establishment of this new office was the result of the labors of a special commission appointed by Gov. Hoffman in August, 1872, to inspect the various insane asylums of the State, and to make recommendations for their better supervision. The report of these commissioners appears as Senate Document No. 40, Session of 1873. The following were the provisions under which this officer was created:

§ 13. The Governor shall nominate, and by and with the advice and consent of the Senate, appoint an experienced and competent physician, to be called the State Commissioner in Lunacy, who shall hold his office for five years, and receive an annual salary of four thousand dollars, and traveling expenses not to exceed one thousand dollars, to be paid on presentation of vouchers to the Comptroller; and who shall ex-officio be a member of the State Board of Charities, and shall make full report of all his official acts and visitations to the said Board, from time to time, under such regulations as the said Board may prescribe. The said Board shall furnish such assistance as the said Commissioner may, in their opinion, require to aid him in the proper and efficient discharge of the duties of his office.

§ 14. It shall be the duty of such Commissioner to examine into and report to said Board the condition of the insane and idiotic in this State, and the management and conduct of the asylums and other institutions for their custody. The duties of said Commissioner and those of said Board in regard to the insane shall be performed, as far as practicable, so as not to prejudice the established and reasonable regulations of such asylums and institutions aforesaid; and it shall be the duty of the officers and others respectively in charge thereof to give the members of said Board and such Commissioner at all times free access to and full information concerning the insane and their treatment therein. It shall also be the duty of such Commissioner, under the direction of said Board, to inquire and report, from time to

time, as far as he may be able, the results of the treatment of the insane of other States and countries, together with such particulars pertaining thereto as he may deem proper, or the said Board may require; and he shall perform such other duties as the Board may, from time to time, prescribe. The authority conferred upon said Board and Commissioners to issue compulsory process for the attendance of witnesses, administer oaths and to examine persons under oath, is hereby conferred upon said Commissioner of Lunacy in all cases where there is, in the opinion of the Board or said Commissioner, from information given to the board or to the said commissioner, or otherwise, reason to believe that any person is unjustly deprived of liberty, or is improperly treated in any asylum, institution or establishment in this State for the custody of the insane, and he shall report the testimony taken in any investigation to the said Board with his opinions and conclusions thereon without delay. The said Board of Commissioners may, in their report, from time to time, to the Legislature, suggest any improvements they think desirable for the care and treatment of the insane, with such facts and information pertaining thereto as they may deem expedient and proper, and such report shall be made annually on or before the fifteenth day of January.

§ 15. This act shall take effect immediately.

The exceedingly cumbrous and confused powers as well as duties imposed upon this officer, in his connection with the State Board of Charities, will immediately appear upon reading the above sections. By designation, mode of appointment and extent of jurisdiction he was made a *State* officer; yet, instead of reporting his official acts to the Legislature, he was required to make them to the State Board of Charities, at whose election only such reports could reach the law-making power. In one clause he was created *ex officio* a member of the Board, while in another he was required to perform *any* duties which they might prescribe. In other words, in one clause he was made their peer, in another their servant. He was also required to report from time to time the results of the treatment of the insane in other *States* and *countries*, a task which no single bureau in any State has ever been required to perform in relation either to other States, and much less to other *countries*, as a continuing duty; yet this duty was assigned to *one* individual.

Lastly, and when we come to the only purpose for which the office was established, viz., to discover and redress wrongs

committed in asylums, we find that no remedy was provided, the Commissioner being required to report the wrong to the State Board of Charities, who, being without judicial powers, could of course apply no remedy, and in turn could only report the facts at the next session of the Legislature, a period of many months after their occurrence. It can easily be conceived in the case of personal abuses of the insane, either by commission or omission, of how little value this statute could have been in affording them any protection against or relief from existing wrongs. To such cases justice delayed is practically justice denied. The obviousness of this truth led the next Legislature to radically alter, as we shall see, these confusing and self-embarrassing powers and duties of the Commissioner.

CHAP. 625, LAWS OF 1873.

An Act to re-organize the New York State Inebriate Asylum and to provide for the better support and maintenance of the same.

CHAP. 661, LAWS OF 1873.

An Act to provide for the support and care of State paupers.

This act created a new class, from non-resident paupers found wandering within the State, and empowers the State Board of Charities to provide for their support and removal. It includes the insane also.

CHAP. 797, LAWS OF 1873.

An Act to amend the Act to incorporate the Inebriates' Home for Kings county.

CHAP. 414, LAWS OF 1874.

Is an act empowering county judges and superintendents of the poor, to send indigent and pauper insane persons to the State Homœopathic Asylum for the Insane.

CHAP. 446, LAWS OF 1874.

An Act to revise and consolidate the statutes of the State relating to the care and custody of the insane; the management of the asylums for their treatment and safe-keeping, and the duties of the State Commissioner in Lunacy.

In his first report, the State Commissioner in Lunacy called attention to the necessity of a revision of the lunacy laws. Those laws in the preceding eighty years of the State government had been left without proper classification. Some were to be found in one chapter of the Revised Statutes, and some in another; some in the organic acts of asylums; and some again had been repealed by changes in the Constitution. Some even had been re-enacted. Such a multiplicity of acts upon one subject, and scattered through the session laws of nearly a century gave rise to much difficulty in finding, and no little confusion in administering them. There was neither harmony among them nor ready adaptation to the changed circumstances brought about by changes in the constitution of courts, or the introduction of a Code of Civil Procedure. Accordingly, on the attention of the Legislature being called to these facts, the following preamble and resolution was thereupon introduced into the Senate.

IN SENATE,
February 24, 1874. }

Mr. WOOD offered the following :

Whereas, The State Commissioner in Lunacy, in his report to the Legislature, has called attention to the necessity of revising some of the laws relating to the insane; therefore,

Resolved, That the Attorney-General and State Commissioner in Lunacy be requested to report to the Legislature a codification of the laws relating to the insane, with such suggestions for their amendment as to them may seem proper, and that they be requested to report at as early a day as may be practicable.

The PRESIDENT put the question, whether the Senate would agree to said resolution, and it was decided in the affirmative.

In compliance with the above, the Commissioners immediately set about performing the duty thus assigned them, and, on the 31st day of March, then ensuing, presented to the

Legislature a complete revision of the Lunacy Laws of the State, in eleven Titles. This revision, which was duly adopted, now forms Tit. 3, Ch. 20, Part 1, of the Revised Statutes, sixth edition, and supersedes, in all provisions relating to lunatics, Tit. 2, Ch. 5, Part 2, of the Revised Statutes. Accompanying the revision was an introductory report, giving the reasons which moved the Commissioners to propose the several amendments suggested therein. (*See Report on a codification of the Laws relating to the Insane, with proposed amendments thereto, prepared in obedience to a Resolution of the Senate, passed February 24, 1874, by Daniel Pratt, Attorney-General, and John Ordonaux, State Commissioner in Lunacy. Senate Doc. 86. Session, 1874.*)

Upon the passage of the bill, the following resolution was adopted :

STATE OF NEW YORK, }
 SENATE CHAMBER,
 ALBANY, *April 30, 1874.* }

Resolved (if the Assembly concur), That 3,000 copies of the bill codifying and amending the laws relating to the commitment and care of lunatics and organization of asylums be printed, and copies be distributed by the Secretary of State to the officers and persons designated to carry out the provisions of the law.

By order,
 H. A. GLIDDEN, *Clerk.*

IN ASSEMBLY, }
 April 30, 1874, }
 Concurred in.

By order,
 J. O'DONNELL, *Clerk.*

In this revision all that was valuable in the former statutes was retained, amendments were introduced wherever deemed necessary, and an effort was made to unify the whole body of these laws so that they might co-operate in their practical application. The new provisions introduced relate to the following subjects, viz.:

The commitment of the insane by civil process; the commitment of the insane by criminal process, and their discharge; the transfer of insane criminals from penitentiaries to the State Asylum at Auburn; pleas of insanity by

persons under indictment for specific offenses ; limits of inquiry upon commissions of lunacy ; accounts of guardians and committees of lunatics ; changes in the organic acts of certain asylums with reference to uniformity in the powers of their managers ; the authentication of official records from the office of the State Commissioner in Lunacy, and providing for uniform returns of statistics annually from the superintendents of poor-houses and county asylums containing insane paupers.

The first of these wrought a radical change in the method of committing lunatics under civil process, and secured, it is believed, the best legal safeguards which can be obtained for all classes of citizens against the possibility of illegal commitment to an insane asylum. The public mind had been greatly exercised by apprehensions in this particular, which were, in the existing loose state of our procedure, well calculated to be magnified out of all reasonable proportions. Several cases had occurred where habitual drunkards had been committed to asylums upon erroneous certificates of lunacy, who had afterward been summarily discharged by *habeas corpus* ; and the public not being able to discriminate, had naturally enough concluded that there might be an element of fraud and collusion in such instances, when, in fact, these cases were simply errors in judgment, likely to occur occasionally under the best of administrations.

Adverting to this subject the superintendent of the State Lunatic Asylum at Utica, in his annual report to the Legislature for 1872, used the following words :

"Of those discharged, *fourteen* were not insane when admitted. Three of these were cases of feigned insanity to escape punishment for crime, and the rest were drunkards, whose vagaries and violence were mistaken for insanity. All these were committed under public authority, and on certificates of insanity on trial by jury."

In order, therefore, to silence all future apprehensions upon this subject, the first provision of the new law was

accordingly drawn up with reference to two important considerations, viz.: that of celerity in action (a violent and dangerous lunatic requiring immediate restraint), and that of a subsequent legal adjudication of the propriety of such confinement. The five days' detention allowed as a measure of physical safety to the lunatic and a safeguard to the public, is in the nature of a preliminary proceeding or inquisition into a statement of facts not yet legally established, and the commitment is complete as to the right to *detain*, but inchoate as to the right to retain. This is analogous in procedure to the arrest of a disorderly person in the streets, who may be detained a certain length of time, but if no one appears to prefer charges against him, must be discharged.

The approval, by a judge of a court of record, as required by the statute, is the final step necessary to give a perfect legality to the original commitment, provided that approval occurs within five days after the admission of the patient into an asylum.

It is not necessary to enlarge upon the other new provisions, as they will be found duly commented upon and explained in their appropriate places. These provisions, after an experience of their practical adaptation to the contingencies of lunacy procedure, have, in the three years of their operation, as yet called for no amendment.

CHAP. 574, LAWS OF 1875.

Is an act to amend the act to revise and consolidate the statutes relating to the insane.

CHAP. 627, LAWS OF 1875.

An Act to amend the Act to incorporate the Inebriates' Home for Kings county.

CHAP. 267, LAWS OF 1876.

Is an act further to amend the act to revise and consolidate the statutes relating to the insane.

CHAP. 142, LAWS OF 1877.

An Act to amend an Act in relation to the support and custody of indigent insane persons of the county of Genesee.

CHAP. 169, LAWS OF 1877.

An Act to provide means for the support of the Inebriates' Home for Kings county, etc., and to amend the several Acts relating thereto, etc.

CHAP. 360, LAWS OF 1877.

An Act in relation to the maintenance of the chronic insane poor of the county of Clinton.

CHAP. 363, LAWS OF 1877.

An Act to authorize the Orange County Asylum for the chronic insane to receive patients or inmates from adjoining counties.

An examination of the foregoing statutes will show that lunacy legislation was, in the early history of our State government, a thing of infrequent occurrence; that it was more seriously and more wisely considered, and in consequence, that the older statutes are those which have, other things being equal, required the least amendments. Dividing the past hundred years into three periods, it appears From 1787 to 1816, there were enacted of Lunacy Laws, 7

“ 1816 “ 1845 (including R. Laws and Rev. Stats.), 19

“ 1845 “ 1877..... 55

The Revised Laws of 1813, Vol. 1, pp. 116–147 and 288, embody the whole of the preceding statutes relating to the care of the persons and estates of idiots, lunatics and infant trustees, without any amendments of the original acts. The first edition of the Revised Statutes of 1829 begins the series of amendments in our lunacy laws. It also introduces the subject of habitual drunkards, assimilating them to *non compotes mentis*, and giving the Chancellor the

custody of their persons and estates. (*Chap. 109, Laws of 1821.*)

That the same care which presided over the enactment of the early lunacy statutes has not continued, and that whether through haste, indifference or practical unfamiliarity with the subject-matter of these acts, recent Legislatures have done their work less accurately may be judged from a few conspicuous instances. Thus, in 1845, when the act was passed (chap. 112) giving committees the right to sue and defend in their own names and to sell the *personal property* of their wards and give valid conveyances therefor, no similar provision was made in relation to *real estate*. It was not until 1864 (chap. 417) that this omission was cured. Even in this latter act haste seems to have presided over its passage, for, in turn, it omitted to include "idiots," so that another act (chap. 37 of 1870) was needed to cure this fresh omission. In this way three acts were required to do what could have been fully accomplished by one.

In 1867 (chap. 843), an act was passed to incorporate the Inebriates' Home for Kings county. The purpose of the statute seems simple enough, and it does not intrude into any other domain than that of internal police. Yet this act has been amended *six* times in the 10 years of its existence, viz., in 1868, 1871, '72, '73, '75 and '77. The instance presented by Genesee county, in chap. 142 of 1877 (see *Special Acts*) is another conspicuous illustration of careless and immethodical legislation. We have cited these cases merely to contrast them with the wise care and discretion exhibited in the labors of our early legislators. Perhaps, with the increased interest felt in the care of the insane, those upon whom it may in future devolve to make our laws will at least familiarize themselves with the history of that department of legislation before acquiescing in the passage of acts which only imperfectly dispose of the matter undertaken, and leave the work to be remodelled and incessantly recast.

CHAPTER THIRD.

REVISED STATUTES, PART I, CHAP. XX, TIT. III,* RELATING TO
THE CARE AND CUSTODY OF THE INSANE, AS CONSOLI-
DATED UNDER CHAPTER 446 OF THE LAWS OF 1874, VIZ.:

- TIT. 1. ART. 1. Commitment of the insane by civil process.
ART. 2. Commitment of the insane by criminal process.
ART. 3. Maintenance of the insane.
- TIT. 2. Care of the estates of insane persons.
- TIT. 3. The State Lunatic Asylum at Utica.
- TIT. 4. The Willard Asylum for the Insane.
- TIT. 5. The Hudson River State Hospital for the Insane.
- TIT. 6. The Buffalo State Asylum for the Insane.
- TIT. 7. The State Homœopathic Asylum for the Insane at Middletown.
- TIT. 8. The State Lunatic Asylum for Insane Criminals.
- TIT. 9. Licenses for private asylums.
- TIT. 10. The State Commissioner in Lunacy.
- TIT. 11. General provisions.
- TIT. 12. Idiots, and the State Asylum for Idiots.

AN ACT to revise and consolidate the statutes of the State relating to the care and custody of the insane; the management of the asylums for their treatment and safe-keeping, and the duties of the State Commissioner in Lunacy.

TITLE FIRST.

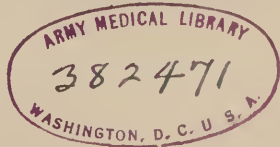
GENERAL PROVISIONS.

ARTICLE I.

*Commitment of the Insane.*¹

SECTION 1. No person shall be committed to or confined as a patient in any asylum,² public or private, or in any institution, home or retreat for the care and treatment of the insane, except upon the certificate³

* Title Second of Chapter Fifth of Part Second of the Revised Statutes treating "*Of the custody and disposition of the estates of idiots, lunatics, persons of unsound mind and drunkards,*" except as to sections 2, 3, 4, 5, 6 and 7, relating to methods of procedure for judicially declaring a person an habitual drunkard, is superseded by chap. 446 of the Laws of 1874, which is a complete revision and codification of all general statutes relating to the personal care of lunatics, and to the care of the estates of all persons of unsound mind, however classified. This chapter now forms Title Third of Chapter Twentieth of the Revised Statutes, 6th edition.



of two physicians, under oath, setting forth the insanity of such person. But no person shall be held in confinement in any such asylum for more than five days, unless within that time such certificate be approved by a judge or justice of a court of record⁴ of the county or district in which the alleged lunatic resides,⁵ and said judge or justice may institute inquiry and take proofs as to any alleged lunacy before approving or disapproving of such certificate, and said judge or justice may, in his discretion, call a jury⁶ in each case to determine the question of lunacy.

DEFINITIONS.

The terms "*lunacy*," "*lunatic*" and "*insane*" are treated as synonymous in our statutes, and it is enacted by chap. 135 of the Laws of 1842, § 46 (2 *R. S.*, Pt. 1, Ch. 20, Tit. 3, § 37), that such terms "*shall include every species of insanity, and extend to every deranged person and to all of unsound mind other than idiots.*" Consequently an idiot, as such, cannot be committed by civil process to a lunatic asylum unless he is also insane. But should he commit an act which, in a sane person, would constitute a crime, he may, either after indictment or upon a preliminary examination before the county judge (§ 26, *infra*), be confined, like any insane culprit, in a State lunatic asylum. The distinctions between idiots and lunatics made by the statute are plain and unmistakable. Insanity, at law, implies a confirmed departure from a previous condition of mental health and of mental power, such as is common to the majority of mankind. Idiots and imbeciles exhibit none of the latter, and being thus *non compos mentis*, are classified by themselves as mental infants with congenital obstacles to development.

1. COMMON LAW PRINCIPLES RELATING TO THE CONFINEMENT OF THE INSANE.

Under the maxim *salus populi suprema lex*, it is no violation of the Bill of Rights in England or the United States to restrain an insane person of his liberty without oath or affirmation. (*Hinchman v. Richie*, Bright. 143; *Brookshaw v. Hopkins*, Lofft. 243.) Such a rule, however, is intended to cover only cases of emergency requiring

immediate restraint, and where delay would be fraught with danger. Hence, a lunatic dangerous* to himself or to others may be arrested by any one as a matter of public right, and temporarily detained in any suitable place, provided it be done in a humane manner, until his condition can be legally inquired into. But this authority is limited to the actual necessities of the moment, and although correctly enforced at the outset, imparts on this account no right of indefinitely continuing such custody. As soon, therefore, as possible after the arrest, judicial proceedings must be instituted in order to certify to the justice of such detention, and to exonerate the party making it from liability for false imprisonment. In *Ex parte Janes* (30 How. Pr. 453), which arose on a *habeas corpus* sued out by a habitual drunkard, praying to be discharged from the custody of the State Inebriate Asylum on the ground that his confinement was unconstitutional, and, therefore, illegal, because enforced without due process of law, the court, in sustaining the application, used this very significant language: "Lunatics may be rightfully restrained of their liberty without legal process and without the intervention of a committee, and they are not always to be let loose on

* At common law any one might confine a lunatic, whether a relative or not, and might beat him or use such other means as are necessary for his cure. (*Tomlyn's Dict.*, "Idiot;" 2 *Rolle's Abr.* 546.) Hence, lunatics might be confined until they recovered their senses, without waiting for the forms of a commission, or other special authority from the Crown. (4 *Bl. Comm.* 25.) And this right was not altered by statutes prescribing methods for committing such persons. For in England, the statutes relating to lunatics, formerly declared that nothing in them should be taken to abridge the powers of the Court of Chancery, nor to prevent any friend or relative from interfering in the case of persons of unsound mind, and it was a good justification for confining, binding and beating them in such manner as was requisite and proper under the circumstances. (1 *Woodeson's Lect.*, p. 410.) In *Brookshaw v. Hopkins*, *Lofft.* 243, it was held that any man may justify an assault when it is to restrain the fury of a lunatic and prevent mischief. So, also, at common law, a physician may always justify measures necessary to restrain a dangerous lunatic. (*Scott v. Wakem*, 3 *F. & F.* 328; *Symm v. Frazer*, *Ib.* 859; *In re Shuttleworth*, 2 *New Mag. Cas.* 34; 2 *New Sess. Cas.* 470; 9 *Q. B. R.* 651.) As to insane persons who are not dangerous, they are not liable to be thus arrested by strangers. (*Bacon's Abr.*, *Trespass*; *Anderson v. Burrows*, 4 *C. & P.* 210; *Fletcher v. Fletcher*, 28 *L. J. N. S.* [*Q. B.*] 134; *Scott v. Wakem*, 3 *Fost. & Fin.* 328; *In re Oakes*, 8 *Law Rep.* 122.)

habeas corpus when confined by strangers. But inebriates cannot be treated as lunatics, unless they are lunatics as well as inebriates, and whoever confines an inebriate must do so by process of law."

In *Colby v. Jackson*, 12 *N. H.* 526, GILCHRIST, C. J., said that:

"1st. If a person be so insane that it would be dangerous to suffer him to be at liberty, *any person* may, from the necessity of the case, without warrant, confine him for a reasonable time, until proper proceedings can be had for the appointment of a guardian.

"2d. That, if it be dangerous to permit an insane person to be at liberty, and he be confined, and, before measures can be taken for the appointment of a guardian, he become sane, and be released, the party confining him will not be a trespasser.

"3rd. That, in trespass for imprisoning the plaintiff, who was then insane, the defendant may show, in mitigation of damages, that he made inquiry whether it would be safe to permit the plaintiff to be at liberty, and was told by the plaintiff's friends and neighbors that it would not, and that he seemed desirous to take the best course for the plaintiff and his family."

In *the Matter of Josiah Oakes*, 8 *Law Reporter*, p. 122, SHAW, C. J., said:

"The right to restrain an insane person of his liberty is found in that great law of humanity which makes it necessary to confine those who, going at large, would be dangerous to themselves or to others. In the delirium of a fever, or in the case of a person seized with a fit, unless this were the law, no one could be restrained against his will. And the necessity which creates the law creates the limitation of the law. * * * * *

"The question must then arise in each particular case, whether a person's own safety, or that of others, requires that he should be restrained for a certain time, and whether restraint is necessary for his restoration, or will be conducive thereto. The restraint can continue as long as the necessity continues. This is the limitation, and the proper limitation. The physician of the asylum can only exercise the same power of restraint which has been laid down as competent, to be exercised by others in like cases."

In Pennsylvania, it has been held that, even after a finding in lunacy, it is a question for the court, as to whether the party shall be restrained of his liberty. (*Nyce's Case*, 2 *Brewst.* 400; *Haskell's Case*, 3 *Ib.* 586.)

And the same court, in a subsequent case, particularized the circumstances under which alone such restraint should occur, by holding that, unless there was danger to the pub-

lic, or to the alleged lunatic or to his estate, he ought not to be restrained, either pending or after the inquisition, although the finding should be against him. (*Comm. v. Kirkbride*, 2 *Brewst.* 419.)

Should the person, however, be an imbecile, and incapable of taking proper care of himself, he may be restrained at any time, precisely as an infant. *Qui se regere non potest, regatur aliunde.* (*Draper's Case*, 3 *Brewst.* 586.)

Although it is against the danger of indefinite detention in custody, whether private or public, of an alleged lunatic, that the law is most jealously watchful, it is nevertheless the fact that, under the Constitution (*Art. 4 of Amendments*), guaranteeing protection to private houses against "unreasonable searches," there is no legal method of testing the necessity for the continued detention of any alleged lunatic in the custody of his relatives, either in his own or their private house. Until an act of overt wrong be alleged against them, no presumption of such arises from time alone. If the party has once been so insane as to justify restraint, we have at present no legal means of ascertaining whether his insanity still continues, or whether it has ceased, and his custodians are now trespassers.

But the physical status of insanity, however manifest, does not, by implication, immediately produce civil disability, and thereby annul the liberty of self-control, until legally established. Hence it follows that neither conjugal nor blood relationship, although imparting superior acquaintance with the alleged lunatic's condition, gives any authority to commit him to the *custody of an asylum*, without due process of law; nor does legal guardianship of the person and estate confer such a right before the insanity is judicially declared. And, although insanity be a disease, whose existence at law is to be determined by medical evidence, still, no physician, whatever his position, *official*, or otherwise, has any more authority than any

other citizen, to order into such custody an alleged lunatic, unless such person had previously been intrusted to his keeping by due process of law, and afterward escaped. (*Anderson v. Burrows et al.*, 4 Carr. & P. 210; *Nottidge v. Ripley*, 12 L. R. 279.)

Should a long period of time, however, occur between the escape of such lunatic and his recapture, this should put his custodians upon their guard as to the exercise of the right of restraining his liberty, and a fresh inquiry, or *melius inquirendum*, into his mental condition, with fresh medical certificates, judicially approved, may be necessary; for, although insanity, when legally established, is presumed to continue until similarly disproved, still it cannot be permanently *res judicata*. Hence the discharge of an alleged lunatic from custody under a *habeas corpus*, because improperly held, does not forbid the right of future restrictions upon his personal liberty, if at any time there shall be sufficient proofs of his insanity to justify the issuing of process to that end.

A committee of the person and estate of a lunatic or habitual drunkard has, under the direction of the court, the entire control of his person, and the right to confine him, if necessary. (2 Hoff. Ch. Pr. 262; *Matter of Hoag*, 7 Paige, 312; See *Committees*.) This right over the person and estate continues until the commission is superseded, although the lunatic may have meanwhile recovered. But it cannot be arbitrarily exercised in restraint of personal liberty where no real necessity for it exists; and a committee might, therefore, by exceeding his authority in this particular, render himself liable in trespass. (*Matter of Oakes*, 8 Law Rep. 122; *Comm. v. Kirkbride*, 2 Brewst. 419.)

INSANE ASYLUMS.

2. At common law a lunatic might be confined anywhere as a person dangerous to be at large. (4 Bl. Comm. 25.)

Originally, therefore, lunatics were immured indiscriminately in jails, poor-houses, out-houses, and wherever else cupidity or convenience prompted, there being no special hospitals constructed for their accommodation. By chap. 90 of the Laws of 1809 the power was given to overseers of the poor to contract with the Society of the New York Hospital for the care and maintenance of lunatics. This is the first instance in the history of the State of any public contract made between the managers of an insane asylum and the legal guardians of the pauper insane for their care and custody. At that early day there was no State lunatic asylum in existence, nor any thing deserving the name of an asylum in any county; nor did the poor-houses make any special provision looking either to the cure or comfort of the insane.

The act creating the State Lunatic Asylum at Utica (*chap. 135, Laws of 1842*) was the first step taken in New York to secure a proper hospital for the insane, and to establish a system of laws for their better protection. As will be seen by reference to its provisions, collected in Title Third, hereinafter commented upon, the chief purpose of the law was to compel the rapid transfer of the insane to the State Lunatic Asylum within the most curable period of their disease, and this has been its uniform policy with reference to every subsequent State asylum which has been organized.

But the law does not forbid the detention and treatment of a lunatic in his own house, nor in that of a relative. And this agrees substantially with the doctrines of the common law, since, although the custody of idiots and lunatics belonged anciently to the Lord of the fee (*Fleta, lib. 1, ch. 11*), and subsequently was transferred to the King, as *parens patriæ*, by the statute *De prerogativa Regis* (17 *Edw. 2nd*, § 1), yet this did not prevent any relative or friend from taking the lunatic under his care (2 *Rolle's Abr.* 546; 4 *Bl. Comm.* 25, *n.*); and this latter implied the right, in common

with any other custodian of a lunatic, to restrain him of his liberty, to chain and to beat him. (*Chap. 294, Laws of 1827, § 5.*)

Necessarily, therefore, no public supervision can be exercised over lunatics in their own houses, or in those of a relative, for the law cannot intrude upon the privacy of domestic life, nor change its character, until some overt act of wrong has been committed. (*Constit'n of the U. S., Art. 4 of Amend'ts.*) It is under this indefeasible right that the privacy of every citizen's house is guaranteed against unlawful violation. It is in fact his castle.

The duty of the State to erect special hospitals for the care and treatment of its insane citizens being now everywhere recognized, and statutes having been passed prescribing the modes of their admission to such institutions, making provisions for their medical care and supervision, and regulating the manner of their discharge, together with the duties of judicial and other officers toward them, it follows that, under the light of such legislation, the term "asylum" becomes a word of definite import. Accordingly, an insane asylum, whether State, county, or private, is not an ordinary hospital, nor a reformatory, though partaking in a measure of both characters. All sick persons cannot be admitted to it, nor even all persons dangerous to themselves or to others, like habitual drunkards, opium eaters, etc. It is not simply a remedial, but also a custodial institution, having an original jurisdiction granted to it by law, and admitting, in consequence, to its care only those who have judicially been recognized as lunatics. This class of persons having a distinct legal status are the special wards of the State, wherever they may be confined. And as the nature of their malady justifies restraints upon their personal liberty, they may be confined as long as the degree of their infirmity requires it. "The necessity which creates the law," says SHAW, C. J., in the case cited above, "creates the limitation of the law."

An insane asylum being thus shown to be a *judicial* hospital, no one can be committed to it save by due process of law. Hence, a lunatic cannot commit himself to its custody, though he should go there of his own free motion, because the act is not one requiring assent of mind, even if in law he had any capacity to give it, which he has not. Nor can a sane person, however mentally depressed, or disordered in his nervous system, commit himself to an asylum so as to authorize subsequent restraints upon his personal liberty. The condition precedent to all permissive restraints upon the personal liberty of a citizen (not in the delirium of a temporary fever) is judicial authority first had and obtained. Now the law can take no cognizance of incipient or prodromic stages of insanity. It can only deal with it as a natural and civil disability when the fact of its existence is duly established. If it is merely hovering in the atmosphere of a person's constitution, it is not yet such an evidential fact as to give color for the exercise of legal restraints upon his liberty. To such an inchoate and undemonstrable condition the maxim fully applies that "*de non existentibus et non apparentibus eadem est ratio.*" The law, therefore, cannot recognize insanity by anticipation, nor provide for its subjects before their disability is judicially established. And as a corollary to this it does not authorize any restraints upon the personal liberty of the sick (except in the temporary delirium of fever) until their insanity is duly proven.

The superintendent of an insane asylum to whose custody any person is legally committed as a lunatic, is not responsible in damages in an action for false imprisonment should it be shown that at the time of such commitment the party was not in fact insane. Unless fraud and collusion can be proved between him and the physicians granting the certificates of lunacy, he may *receive* the alleged lunatic with impunity. This question was fully examined by the House of Lords, in *Mackintosh v. Smith* (4 *Macq. H.*

L. Cas. 913), and it was there held, all concurring, that "even assuming that a person is of sound mind when conveyed under proper authority to a lunatic asylum, it would not be illegal on the part of the keepers of that asylum to detain him until they had proper authority for his discharge."

But reception of a patient in ignorance of his sanity and detention of him after knowledge of that sanity are essentially opposite points in the problem of confinement. They entirely change its complexion from immunity on the one hand to fraud upon the other. Hence, the field of responsibility for false imprisonment is immediately entered when the latter point is reached. As soon, therefore, as sanity is a recognizable fact every legal reason and justification for further detention ceases, and the superintendent who continues it becomes thenceforth a trespasser. Nor can this person willfully close his eyes against the knowledge of such a fact by way of excusing his trespass. For the law has placed him there for the purpose of exercising a constant oversight of the mental condition of his wards, and it is his duty to discover what that condition is as the basis for his authority to hold them in custody. Unless he can legally justify that custody he has no right to exercise it.

Furloughs to patients.

Furloughs to patients to absent themselves from the asylum grounds may always be granted by superintendents under the following conditions, viz.:

First. That such furloughs are necessary to the health of the patient and part of the means employed for his cure, by affording him change of air and surroundings, and opportunities to test his powers of self-guidance and control. They are, in fact, trials of the patient's mental poise in the world of independent individual action.

Second. If the patient have a committee of the person, permission should first be obtained from him by the super-

intendent before granting furloughs to visit different or distant places. The committee, it must be remembered, is the bailiff of the court in respect to the custody of the lunatic, and may alone select, under the sanction of the court, the place of residence of his ward. (*Matter of Hoag*, 7 *Paige*, 312.) It is very questionable, however, whether the committee can authorize his ward to go beyond certain limits. For, although it is usual to confide such matters to the discretion of the committee, it is doubtful whether he could allow the patient to be carried out of the State, and therefore out of the jurisdiction of the court. Certainly, if he did, he could be compelled to produce him within the State when and as often as ordered, or forbidden to remove him altogether. (*Matter of Wing*, 2 *Hun*, 671; See *Committees*.)

Of course a patient on furlough is still, in legal contemplation, in the custody of the superintendent of the asylum, and may, if he escapes, be recaptured and returned to such asylum without a fresh commitment. But the furlough granted should specify a definite time for his return, if only to be examined and his progress toward recovery ascertained. An indefinite furlough would be tantamount to a discharge, and new medical certificates, newly approved, would be required after the lapse of any long interval of time, before the patient could be again legally confined in the asylum. While the law makes all reasonable concessions to the discretion with which it invests the superintendent, it cannot, at the same time, overlook any laches on his part to discover the earliest day of full recovery of his patient, so as to discharge him from custody, and for that purpose would not favor long furloughs nor an assumed supervision of the lunatic which did not in fact exist.

3. CERTIFICATES OF LUNACY AND RESPONSIBILITIES OF PHYSICIANS.

The right to give a certificate of lunacy, whereby any citizen may for five days be held in custody, is a grant of

power of a very responsible character. The physician who is permitted to exercise it should remember that, like all legal franchises, he takes it *cum onere*. Hence an action will lie against him for maliciously, and without any reasonable or probable cause, signing a certificate that a party was insane and in a state requiring to be confined, in consequence whereof a party had been detained in custody as a lunatic. (*Shelford on Lunatics*, p. 518, 2nd Edn.) Or such certificate might be considered a libel, in which case an indictment would lie against the person signing it. (3 *Johns. Cas.* 337-354; 9 *Johns.* 215; *Southwick v. Stevens*, 10 *Ib.* 443; 3 *Bl. Comm.* 125; 4 *Ib.* 150.) Or if insanity be charged in a person through words maliciously spoken and with intention to hold him up to contempt and ridicule, it is slander. (1 *Stark. on Slander*, 153.) No special damage need be averred to sustain such an action.

Therefore, our courts have held that it is clearly libelous to publish of another that he is "insane and a fit person to be sent to the lunatic asylum," or that "he is so disordered in his senses as to endanger the persons of other people if left unrestrained, and that it is dangerous to permit him longer to go at large."

The libelous character of such language will not be destroyed or diminished by the fact that the person uttering it is a physician and makes the statement as a professional opinion.

To give to a statement made by a physician, which would otherwise be criminatory and libelous, a privileged character, he must not only utter it as a medical man, but it must be made in the discharge of a duty, and to a person having a corresponding duty to the subject-matter.

It is not libelous or actionable as such for a physician to furnish evidence, either voluntarily or under a subpoena, that another is insane, in a proceeding duly taken under any of the clauses of the statute relative to the safe-keep-

ing and care of lunatics. (*Perkins v. Mitchell*, 31 *Barb.* 461.)

But a physician who has merely signed a certificate, and has done nothing more toward causing the confinement of a lunatic, is not liable in trespass. Nor, if he has merely consulted with another physician who has signed the other certificate and told him his own idea of the case, is he liable for causing the other to sign such certificate. But if he signs such a certificate without taking due care and making due inquiries, he is liable for the consequences which ensue. And if, on his own personal examination, he is not satisfied, he is bound to make due inquiries. Nor is he the less liable for the want of such due care and inquiries, because he has acted *bona fide*. (*Hall v. Semple*, 3 *F. & F.* 337.)

4. COURT OF RECORD, APPROVAL OF CERTIFICATES, AND LEGAL COMMITMENT.

The commissioners to whom the Legislature in 1874 assigned the duty of revising our Lunacy Statutes, in their report to that body made the following observations upon the loose method of committing the insane, then practiced by inferior magistrates. "Justices of the peace are now permitted to commit certain persons alleged to be insane, not only upon representations of others, and upon being satisfied that it would be dangerous to permit them to go at large, but even *without the application of any officers, and upon their own view, or upon the information or oath of others.*" (See *Report on Codification of the Laws relating to the Insane* by Daniel Pratt, Atty.-Gen., and John Ordronaux, State Comm. in Lunacy, Senate Doc. 86, Sess. 1874.) It was accordingly deemed best for the security of personal liberty to withdraw the power of commitment from inferior magistrates, and to vest it solely in *courts of record*. Daily experience is fully vindicating the wisdom of this change in procedure.

What special powers are necessary to constitute a court

of record has at times given rise to much discussion, and the question can generally be decided only by referring to the source of origin of the court and the character of its jurisdiction. The authorities in this State favor the recognition, as courts of record, only of such tribunals as have attributes and exercise functions independently of the person of the magistrate designated generally to hold them, and whose proceedings are according to the course of the common law. (*Thomas v. Robinson*, 3 *Wend.* 268; *Scott v. Rushman*, 1 *Cowen*, 212; 8 *Metc.* [*Mass.*] 171; *Bouvier's Dict., ad verb.*)

Such tribunals are, properly speaking, courts of general jurisdiction, and may assume powers by implication; while courts *not* of record are of inferior jurisdiction and strictly confined to the authority conferred upon them by statute.

Under the new Code of Civil Procedure the following are now constituted courts of record in New York.

1. The Court for the Trial of Impeachments.
2. The Court of Appeals.
3. The Supreme Court.
4. A Circuit Court in each county.
5. A Court of Oyer and Terminer in each county.
6. The Court of Common Pleas for the city and county of New York.
7. The Superior Court of the city of New York.
8. The Court of General Sessions of the Peace in and for the city and county of New York.
9. The Superior Court of Buffalo.
10. The City Court of Brooklyn.
11. The City Court of Long Island city.
12. The City Court of Yonkers.
13. A County Court in each county, except New York.
14. A Court of Sessions in each county, except New York.
15. The Marine Court of the city of New York.
16. The Mayor's Court of the city of Hudson.
17. The Recorder's Court of the city of Utica.

18. The Recorder's Court of the city of Oswego.
19. The Justices' Court of the city of Albany.
20. A Surrogate's Court in each county.

In every application to obtain the approval of a court of record, both medical certificates must be submitted to the judge for his approval. And where only one certificate is given at the usual place of residence of the alleged lunatic, and the second certificate at some other place, or in some other county, it would be irregular for the court before which the case is brought to grant its approval upon one certificate alone. The statute clearly contemplates that the judge approving the certificates shall have the whole case before him and pass upon it, as an entirety. Any thing less than this would not warrant the confinement of the alleged lunatic.

Who must obtain the approval of a court of record to medical certificates in lunacy.

The Revised Statutes (§ 1, *Tit. 3, Chap. 20, Part 1*), make it the duty of the committee, guardian or relatives of the insane person to confine and maintain him; and in case of their default, either through neglect or inability, this duty, so far as the pauper insane are concerned, devolves upon the superintendents of the poor. Again, an essential pre-requisite to the right of confining any lunatic in an asylum beyond five days is the obtaining of the approval of a court of record thereto. Consequently, if it be the duty of the committee, guardian or relatives of a lunatic to confine him in an asylum, it is plainly incumbent upon them also, as part of that duty, to complete every step necessary to render that confinement legal. It devolves upon them, therefore, to obtain the approval of a court of record, as well as to obtain the necessary medical certificates upon which it is based, within the five days allowed by the statute. Whoever may be the legal guardian of an insane person, whether it be the committee of his person and

estate, or in the case of the pauper insane, the superintendents of the poor, it is equally the duty of such guardian, personally or by agent, to obtain the necessary approval of a court of record.

On the other hand, it is not the duty of the medical superintendent of an asylum to whose custody lunatics have been committed, when five days shall have elapsed without such judicial approval, to make application to the court for its confirmation of his right of custody. The third section of the present Title impliedly forbids this when it forbids him "to certify to the insanity of any person for the purpose of committing him to an asylum of which the said physician is either the superintendent, proprietor, an officer, or a regular professional attendant therein." Now, how can he ask for the approval of any medical certificates of lunacy without inferentially certifying to their correctness. Because, if such certificates are false, it is the duty of the superintendent not to hold the patient, but to discharge him. If, on the other hand, they are genuine and affirm facts which he knows to be true, then his asking in person for their approval is tantamount to certifying to the correctness of their conclusions, in other words, to certifying to the insanity of the patient, the very thing which the statute forbids him to do.

If then, after the expiration of five days, no approval of medical certificates in lunacy is received by the superintendent of an asylum, he should, as a protection to himself, immediately return the patient to the custody of his legal guardians. No matter how dangerous the patient is, provided only that life be not thereby jeopardized, the superintendent has no legal right under the statute to hold him in custody. It is not *discharging* him to return him to his friends. It is simply removing him from a custody in the asylum, which is illegal, to the custody of his legal guardians, which is lawful. It is for them to confine him in a lawful way, and not for the superintendent to confine him in an unlawful way.

Must a lunatic be dangerous to justify his confinement?

In discussing the necessity of the confinement of the insane, as ordinarily predicated upon impending danger to themselves or the community, it is impossible to lay down any absolute rules for universal application. The common law, which ever recognizes the right of personal liberty as among the most inalienable of all civil rights, permits no restraints to be placed upon it, except such as may be necessary for the protection of the community. *Salus populi suprema lex.* But inasmuch as the insane are themselves a portion of the community, it follows that society is as much bound to protect them against their own acts, as it is to protect itself against these same persons. The duty of the whole community to the individual is, therefore, but a reflection of the duty of each individual to every other.

In using the adjective "dangerous," when applied to the insane as a condition precedent, and *sine qua non* to the right to confine them, it is common to associate with that term ideas of personal violence either actually exhibited by the party, or foreshadowed in threats or behavior toward his own person or that of others, or again toward property. The logical inference to be drawn from these ideas is, that where there is neither actual violence exhibited, nor evidence of any tendency toward it, there is no legal justification for confinement. In fact, before the present revision of our lunacy laws, the statute enacted that "when any person, by lunacy or otherwise, becomes furiously mad, or so far disordered in his senses as to endanger his own person, or the person or property of others, if permitted to go at large, who is possessed of sufficient property to maintain himself, it shall be the duty of the committee of his person and estate to provide a suitable place for the confinement of such person, and to confine and maintain him in such manner as shall be approved by the overseers of the poor of the city or town." (§ 1, Title 3, Ch. 20, Part 1, R. S.)

This would seem to imply, therefore, that the law recognized no other form of insanity than such as was accompanied by violence. Now, if the common law could take cognizance of no other class of insane persons save those who are violent in demeanor or destructive in propensities, it would certainly fail to protect a large portion of the insane in every community. Viewed under that aspect, the most helpless class would receive neither recognition nor protection; no hospitals or asylums would be open to them, because if insane they could not voluntarily commit themselves to their keeping, and if not violent and dangerous, there would be no legal right to confine them possessed by any one.

It was for these reasons that the revisers of our lunacy laws, in expunging this provision, said, in their report to the Legislature, that "the imputation of violent propensities should not be affixed, through a legal record, to sick persons who are only exceptionally and not permanently violent, making it an established fact as a condition precedent to commitment."

It is manifestly, therefore, a perversion and mis-interpretation of the spirit of the common law to allege any such inconsistencies in its philosophy. An insane person is, like every person under guardianship, deemed incapable of self guidance; and if it be necessary for his better treatment and recovery that he should be sent to an asylum, the question of its expediency is one purely of fact, and not of law. It is to be decided, therefore, by those to whom the law of the land has intrusted that duty, and without reference to any arbitrary rules, based upon the outward demeanor of the party alone. In any other disease than insanity it would never be questioned that a man might be dangerous to himself or to others, without exhibiting any violence. Thus, one afflicted with a contagious disease, if allowed to walk the streets, might endanger his own life as well as that of others, and confinement of such a party, or his arrest,

should he break through its restrictions, would be justifiable in law.

In making distinctions between the forcible confinement of the sick and delirious to their beds, both as a duty to them and a right on the part of their friends or guardians, and the confinement of the insane in asylums under due process of law, there is a disposition in the public mind to look upon the latter as in some sense an imprisonment. Now, forcible confinement is only an incident to medical treatment in an asylum, and would be unnecessary, were the insane capable of appreciating correctly their position there as sick people receiving a form of treatment without their consent, but for their ulterior benefit. This the majority cannot, of course, comprehend; therefore the law allows forcible confinement in *favorem vite*.

Again, as to how dangerous a man should be to justify his confinement is a question which should not be put in that form. It is too vague in itself, has no proper limits, and expresses little or much, according to the ideas of the individual judge who decides it. The only proper way in which to put it is, to ask how dangerous to the present and future mental welfare of the individual his insanity is; in other words, whether he needs such treatment as is afforded alone in an asylum, and is therefore a proper person for care and treatment therein. If so, then no matter whether he be quiet and harmless, for it is still the duty of society to protect him against the consequences of a disease both dangerous to him and to others. The proper test in all cases is the dangerous nature of his disease, not the dangerous character of his demeanor alone. Hence the right to confine him, if necessary, is an incident in the treatment of his malady, which the State may permit in virtue of that discretionary power of guardianship which arises by implication of law from the *capitis diminutio* of the citizen.

It was in accordance with such views of the authority of guardianship over the insane that the Superior Court of

New Hampshire, in *Davis v. Merrill* (47 N. H. 208), held that "Where there is no legal guardian, the law intrusts it to the relatives and friends of an insane man to place him in an asylum in a proper case; nor, to justify them in placing him there, is it necessary that such insane person should be dangerous. If it is proper that he should be placed there because his case requires treatment in the asylum with a view to cure, or because his insanity is of such a character as to make it improper that he should remain in his family or neighborhood, on account of the disturbance and trouble caused by his insanity, or for any other cause, the relations and friends may place him there; that, if the relations and friends in such a case act from good motives, with prudence and sound discretion, the law intrusts it to their judgment to decide, where there is no guardian, whether the insane person shall be sent to the asylum, and if they exercise their best judgment honestly and discreetly, they are justified; that the relatives and friends cannot decide whether the person is insane, and that the fact of insanity must be proved on trial."

This whole subject was fully examined by the English Commissioners in Lunacy on the occasion of Chief Baron POLLOCK's instructions to the jury in *Nottidge v. Ripley* (12 L. R. 279); and in a letter addressed by them to the Lord Chancellor, and printed by order of the House of Commons (*Sess. Pap. No. 620, Aug. 1st, 1849*), they say that "The object of these (lunacy) acts is not, as your lordship is aware, so much to confine lunatics, as to restore to a healthy state of mind such as are curable, and to afford comfort and protection to the rest. Moreover, the difficulty of ascertaining whether one who is insane be dangerous or not is exceedingly great, and in some cases can only be determined after minute observation for a considerable time."

(See also article on *Confinement of the Insane* in American Law Review for January, 1869. *Brush's Case*, 3 Abb. New Cas. 325; *Ayer's Case*, *id.* 218.)

Legal commitment.

The arrest, as a matter of public right, of an alleged lunatic, dangerous to himself and to others, and his removal to an asylum, upon the certificates of two physicians, pending judicial approval of the same, is not in itself a legal commitment. Nor was it intended to be so by the revisers of the statute. But the frequent necessity for summary arrest and restraint of the person in cases of lunacy being everywhere recognized, the duty of securing some provisional means of protection to society, as well as to the alleged lunatic, gives color of right to such summary procedure *ab initio*. Accordingly, the five days' detention is allowed as a measure of physical safety to the patient, and a safeguard to the public. It is in the nature, therefore, only of a preliminary inquisition into a statement of facts not yet judicially verified. This provisional commitment to an asylum is complete as to the right to *receive* into custody, but inchoate as to the right to detain. It is analogous in procedure to the arrest of a disorderly person in the streets, who may be detained a certain length of time, but, if no one appears to prefer charges against him, must be discharged.

In order to render the commitment complete, the statute requires the approval of a judge of a court of record. This judicial verification of the legality of the arrest and commitment to an asylum, constitutes a warrant of commitment, and may consequently be pleaded in bar to an action for false imprisonment.

If any doubt can arise as to this being a rightful interpretation of the statute, it will be dissipated by reference to the second section, where it is enacted that "No certificate of insanity shall be made except after a personal examination of the party alleged to be insane, *and according to forms prescribed by the State Commissioner in Lunacy.*" Now, in the forms so prescribed, it is required to be recited by the affiant medical examiner that "I, A. B., a

resident of ———, in the county aforesaid, being a graduate of ———, and having practiced as a physician ——— years, hereby certify under oath that on the ——— day of ———, *I personally examined John Doe, of ———, and that the said John Doe is insane, and a proper person for care and treatment under the provisions of chap. 446 of the Laws of 1874.*"

When, therefore, a court of competent jurisdiction attaches the confirmation of its approval to such a certificate, it sustains both the reasons and the method of the commitment under them, and gives finality to the legal character of the custody. It is in fact a legal judgment, carrying with it all the accompanying incidents *quoad hoc*.

5. RESIDENCE OF LUNATICS.

For purposes of maintenance as either a *town* or *county* charge, the residence of an alleged lunatic is to be determined by the same laws which apply to any pauper. (2 *R. S.*, Part I, Ch. XX, Tit. 1, § 29.) And this fact being ascertained, the question of what judge or justice of a court of record shall approve of the medical certificates committing such lunatic to an asylum becomes one of locality alone.

It is not unfrequently the case, however, that *foreign* paupers (not emigrants duly registered as such) are found at large and in a condition of insanity within our borders. Such persons have manifestly no legal residence within the State. They may be arrested and transported to the nearest State alms-house under *chapter 661 of the Laws of 1873*, § 9, and thence removed, under the order of the Secretary of the State Board of Charities, to the appropriate State asylum for the insane. Wherever they are arrested, the jurisdiction of the nearest courts of record attaches itself to them, and they may be duly committed as lunatics in the manner prescribed by law.

Persons (not paupers) judicially declared to be lunatics pursuant to the laws of any of the States of the Union,

and coming within this State to obtain treatment in our asylums, may be lawfully received therein, in accordance with the provisions of the Constitution of the United States (*Art. 4, § 1*), which recite that "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, etc."

But medical certificates of lunacy are not in themselves judicial records, unless they bear test of approval by some tribunal of competent jurisdiction. And without this, they can give no authority to any superintendent of an asylum to hold an alleged lunatic in custody. No restraint of one's personal liberty is, in general, legal without due process of law, and in receiving a lunatic coming from a foreign jurisdiction, it should be made evident that the tribunal purporting to have jurisdiction had it *de jure* under a statute of that State. (*Wheeler v. Raymond*, 8 *Cowen*, 311; *Comm. ex rel. Stewart v. Kirkbride*, 2 *Brewster*, 419.) The attestation of a judgment of a State court, in order to make it evidence in another State, under the act of Congress, must be signed by the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice or presiding magistrate, as the case may be, that said attestation is in due form. (*Morris et al. v. Patchin*, 24 *N. Y.* 394; *Act of May*, 1790, § 1; 1 *Story's Laws, U. S.*, 93; *Brightly's Digest*, 262.)

It is the duty, therefore, of the superintendent of the asylum, before accepting the custody of such lunatic, to demand legal evidence that the papers accompanying him are either original documents or certified copies thereof. And he must further see that such documents are not so old as to afford ground for any presumption of fraud. In either case, he must satisfy himself by a personal examination of the papers and the patient, both as to his *identity* and *continuing lunacy*. For although the above cited clause of the Constitution gives the right to accept such judgment as *legal*, it does not authorize him to act upon it as

conclusive of the facts upon which it rests. A finding in lunacy is not such a *res judicata* as to forbid its subsequent impeachment, for time may have changed essentially one of the four conditions upon whose concurrence rests the permanency of any judgment, viz., *identity of the quality in the person* for or against whom the claim is made.* The authority to restrain the personal liberty of any one must co-exist with its necessity. The moment the latter ceases the former ceases also, and the party exercising the restraint becomes a trespasser. Nor in the absence of this *sine qua non*, will the judgment of any past finding in lunacy furnish a defense to an action for false imprisonment. Every superintendent of an asylum, therefore, who receives an alleged lunatic into his custody, holds him upon the legal condition that his lunacy is susceptible of proof. Certificates of other physicians, with the approval even of courts, will not excuse him for exercising an erroneous restraint. *Vigilantibus non dormientibus subvenit lex.*

In the case of lunatics (not paupers) brought from Canada or the British provinces into this State, although they be provided with certificates pursuant to the laws of their own country, such documents have no legal value outside of the jurisdiction within which they were issued. There is no more self-evident principle in international law than that the jurisdiction of any sovereign does not extend beyond the limits of his own territory. Even the comity of nations would not cover such cases outside of treaty stipulations, and particularly so in the United States, where the Constitution (*Art. 5, § 1 of Amendments*) expressly declares that "No person shall be deprived of life, liberty or property without due process of law." It is manifest that Canadian proceedings in lunacy are not "the law of the land"

* Pothier on Oblig., part 4, ch. 3, art. 4th, § 3.

"Quum quaeritur haec exceptio (rei judicatae) noceat necne; inspiciendum est an idem corpus sit, quantitas eadem, idem jus; et an eadem causa petendi et eadem conditio personarum; quae nisi omnia concurrunt, alia res est."

Digest. lib. 44, Tit. 2, § 2, *De Except. Rei Judicatae.*

in the United States, and such foreign lunatics must, in consequence, be recommitted under the laws of this State.

As to the apparent difficulty which lies in the way of such commitment, owing to the statute requiring certificates of lunacy to be approved by a court of record of *the county or district where the alleged lunatic resides*, it will be readily seen that a foreign lunatic having no residence in the United States, and being found within the jurisdiction of our laws resides, for all legal purposes of protection to himself or to others, wherever he is found judicially to need restraint, and is subject, like every one else, to the laws of that place. Allegiance and protection are reciprocal obligations which extend even to aliens and strangers while within the limits of a State, and in return for the temporary and local allegiance due on their part, they are entitled to its protection. (*Matter of Colah*, 3 *Daly*, 535; *Matter of Bariatinski*, 1 *Ph.* 370; *Highmore on Lunacy*, 18; 1 *Bl. Comm.* 370; *Cockburn on Nationality*, 139.) Insanity being a civil disability everywhere, the *lex fori* which always governs the status of the person must be the rule by which the party's disability is established, rather than the *lex domicilii*, although the latter might not in spirit differ from it.

TRIAL BY JURY OF AN ISSUE OF INSANITY.

6. The supposed protection to personal liberty afforded by a jury trial in an issue of insanity has long since been shown to be more imaginary than real, and if statistics can be relied upon as any proof, they conclusively show that more verdicts against evidence have been rendered by juries on commissions of lunacy, than by any other form of trial. Adverting to this subject, the superintendent of the State Lunatic Asylum at Utica, in his annual report to the Legislature for 1872, speaking of the admissions and discharges of patients, uses the following words: "Of those discharged, *fourteen* were *not* insane when admitted. Three of these were cases of feigned insanity to escape punish-

ment for crime, and the rest were drunkards whose vagaries and violence were mistaken for insanity. *All* these were committed under public authority, and on certificates of insanity, *on trial by jury*." It is a mistake also to suppose that there is any constitutional right to it, since in the early days of our jurisprudence, Chancellor KENT held that a court of equity could at any time try an issue of insanity without the intervention of a jury (*Smith v. Carll*, 5 *Johns. Ch.* 118; 2 *Vern.* 413, 678; 2 *P. Wms.* 203; 2 *Atk.* 324; 13 *Ves.* 136; 9 *Ib.* 605; 4 *Bro. P. C.* 557); and it has been frequently held in this State that a traverse is not a matter of course, but rests in the discretion of the court. (*Matter of Tracy*, 1 *Paige*, 580; *Matter of Clapp*, 20 *How. Pr.* 385; *Matter of Wendell*, 1 *Johns. Ch.* 599; *Matter of Russell*, 1 *Barb. Ch.* 38.) Even in England, the birthplace of our common law, the expensiveness and comparative uselessness of jury trials in issues of insanity (the proceedings when uncontested never costing less than £60), has led to the very general abandonment of this form of procedure. Statistics show that out of 575 commissions issued in the ten years preceding, only 21 were tried before juries. (*Taylor's Med. Jur.*, ch. 61, p. 659.)

§ 2. It shall not be lawful for any physician¹ to certify to the insanity of any person for the purpose of securing his commitment to an asylum, unless said physician be of reputable character, a graduate of some incorporated medical college,² a permanent resident of the State, and shall have been in the actual practice of his profession for at least three years, and such qualifications³ shall be certified to by a judge of any court of record. No certificate of insanity shall be made except after a personal examination⁴ of the party alleged to be insane, and according to forms⁵ prescribed by the State Commissioner in Lunacy, and every such certificate shall bear date of not more than ten days prior to such commitment.⁶

1. In the absence of special statutes the law does not exclusively recognize any particular system of medicine or class of medical practitioners. (*Corsi v. Maretzek*, 4 *E. D. Smith*, 1; *Ordronaux's Jurisp. Med.*, § 5; *Sutton v. Tracy*, 1 *Mich.* 243.)

Before the passage of this act any person, who chose to

assume the title of physician, or any physician however ignorant of the physiognomy of insanity, could give a certificate of lunacy that would justify the legal commitment of an alleged lunatic to an asylum; nor was it necessary that such physicians should be residents of the State. The lowest civil magistrates were also authorized to commit alleged lunatics, an authority which they frequently abused. Thus between the ignorance of un-accredited physicians and justices of the peace, the personal liberty of a citizen alleged to be insane, was exposed to the severest risks which malice, fraud and bribery could concoct.

2. It is not necessary that the word "college" should appear in the diploma, since the term in law means simply a corporation, and any medical *school* when incorporated, is within the intent of the statute. So also with the word "university" which is a noun of multitude, and when applied to literary corporations is a term of inclusion, implying *all* the Faculties of *Arts, Law, Medicine and Theology*. If any restrictions in either of those departments are annexed to its charter, they should appear as terms of limitation or exclusion, but cannot be inferred in the presence of the *universitas juris*, because *omne majus in se minus continet*. Thus the Regents of the University were authorized to grant degrees in medicine (2 *R. S.*, chap. 15, Tit. 1, Art. 1, § 19, 6th Ed.) as early as 1809 (5 *Webster*, 565), but by chap. 366 of the Laws of 1840, authorizing them to confer *honorary* degrees, it was recited that such degree should in no sense confer a license to practice. The University of the City of New York, by its act of incorporation (chap. 176, *Laws of 1831*, §§ 9 and 10) is granted all the powers belonging to similar institutions. The University of Buffalo (chap. 193, *Laws of 1846*, § 8) is especially empowered to grant medical degrees. The University of Rochester (chap. 146, *Laws of 1846*), Madison University (chap. 40, *Laws of 1846*), University of Albany (chap. 199, *Laws of 1851*), have each conferred upon them all the general powers belonging to similar institutions.

Certificates of Qualification.

3. The certificates of qualification given by courts of record to physicians, thereby constituting them examiners in lunacy, are in the nature of licenses, and good until revoked by competent authority or annulled by some act of the party done in derogation of the statute, such, for example, as loss of good character or removal from the State.

Personal examination.

4. The law contemplates that this shall be thorough and conscientious, not merely perfunctory, and where two physicians are present each must examine the alleged lunatic in turn, since the word "personal" applies both to the examiner in lunacy as well as to the party examined. The certificate of such examination being made under oath, the party subscribing it commits perjury if he omits to do any thing which the statute requires that he shall do, and which the certificate both implies and asserts that he has done. The language of the statute and of the certificate framed upon it is absolute, and does not allow personal discretion to enter into its interpretation. The examiner in lunacy *must* therefore have legally done what he states in his certificate that he has done, otherwise he is liable to indictment for perjury.

Forms of Certificates of Lunacy.

5. The forms for certificates of lunacy, as prescribed by the State Commissioner in Lunacy, will be found in the Appendix. As to the substantive facts affording evidence of insanity, which are called for by the certificate, they *must be specifically stated*, and any certificate omitting these should be rejected by the court on the ground of indefiniteness. Insanity cannot be presumed until first established by adequate proofs.

A medical certificate in lunacy being intended to inform the court, to which it is presented for approval, of the

facts and conclusions to which it testifies, should be definite and precise in its language, not repetitious in statement nor yet disjointed in attempts at condensed expression. After reciting the facts observed, as so many symptoms belonging to the particular case, it should state as a conclusion that such symptoms are consistent with no other theory than that of the insanity of the patient. For although the supposed fact of the insanity is mentioned as an allegation in the first part of the certificate, yet as the reasons for that opinion are also called for, all the facts which have led to them should not only be stated but their medical significance interpreted for the information of the court. In England, this point has already been settled. And *In re Fell* (3 Dow & Low, 373), where there was an omission to comply with the 46th section of the Statute of 8 and 9 Vict., requiring specific facts to be stated in a medical certificate of lunacy, it was held that such omission was fatal. And since it is a matter now of statutory obligation in New York, as well as in England, to follow certain prescribed forms in giving medical certificates, the ruling made in the above-cited case would doubtless be affirmed here, did any occasion arise for a judicial interpretation of the intent of the statute.

But the statute is peremptory in designating the particular officer who shall prescribe the forms under which alone medical certificates in lunacy can be made. No court, therefore, has any authority to prescribe forms for its own use. For if it can be done by one tribunal, it can be done by all, and each might then establish its own standard of medical evidence of insanity and thus occasion confusion throughout the State. It need hardly be said that lunatics committed under any other forms of medical certificates than those prescribed by the State Commissioner in Lunacy, are illegally committed; that superintendents of asylums render themselves liable to actions for false imprisonment in holding persons in custody under them, and lastly, that it is the duty of the State Commissioner in Lunacy, on

finding persons thus illegally committed, to secure their immediate discharge.^o

New certificates required for re-admission to asylums.

6. Medical certificates authorizing confinement in an asylum have a legal existence only so long as the circumstances justifying such confinement exist. Whenever these expire, the certificates expire also. Hence, every time a patient is discharged from an asylum, whether cured or uncured, fresh certificates will be needed for his re-admission, if more than ten days have elapsed.

§ 3. It shall not be lawful for any physician to certify to the insanity of any person for the purpose of committing him to an asylum of which the said physician is either the superintendent, proprietor, an officer or a regular professional attendant therein.

§ 4. Every superintendent of a State asylum or public or private asylum, institution, home or retreat for the care and treatment of the insane, shall, within three days after the reception of any patient, make or cause to be made, a descriptive entry of such case in a book exclusively set apart for that purpose. He shall also make entries from time to time of the mental state, bodily condition and medical treatment of such patient, together with the forms of restraint employed, during the time such patient remains under his care, and in the event of the discharge or death of such patient, the superintendent aforesaid shall state in such case-book the circumstances appertaining thereto.¹

1. It cannot be necessary to dwell upon the great importance of recording, while yet fresh, the *prominent facts* in the life of every patient in an asylum. They also form a record of the internal management of the institution, in directions where omissions of duty by officers or attendants might lead to the most serious results. These facts should be noted as soon as discovered, together with the impressions produced by them on the mind of the observer. They should, like photographs, be taken *in situ*, rather than condensed from the re-collected fragments of many such observations intermingled in the memory, and written out several hours or days after their occurrence. Of course, it is to be understood that the entries of such facts may be legally made by assistant physicians as well as by the superintendent under the maxim *qui facit per alium facit per se*.

§ 5. The county superintendents of the poor of any county or town, to which any person shall be chargeable, who shall be, or shall become a lunatic, may send any such person to any State lunatic asylum by an order under their hands, and in compliance with the provisions of this act.

1. One superintendent cannot legally send a lunatic to an asylum. It must be done by a majority of the Board. (1 *R. S.* 617, § 15; *Johnson v. Dodd*, 56 *N. Y.* 76.)

§ 6. In case of the refusal or neglect of any committee or guardian of any lunatic, or his relatives, to confine and maintain him, or where there is no such committee, guardian or relative of sufficient ability to do so, it shall be the duty of the overseers of the poor, or constables of the city or town where any lunatic shall be found, to report the same forthwith to the superintendent of the poor, who shall apply to the county judge, special county judge or surrogate, who, upon being satisfied upon examination that it would be dangerous to permit such lunatic to go at large, shall issue his warrant, directed to the constables and overseers of the poor of such city or town, commanding them to cause such lunatic to be apprehended, and to be sent within the next ten days to some State lunatic asylum, or to such public or private² asylum as may be approved by any standing order or resolution of the supervisors of the county, to be there kept and maintained until discharged by law.³ (*Ch.* 218, *Laws of 1837.*)

1. It will be seen by § 37 of this Title, that "whenever any person who is possessed of sufficient property to maintain himself becomes, by lunacy or otherwise, so far disordered in his senses as to endanger his own person or the person or property of others, it shall be the duty of the committee of his person and estate to provide a suitable place for his confinement, and to confine and maintain him in such manner as shall be approved by the proper legal authority." This was originally in the *R. S.* (§ 1, *Tit.* 3, *Ch.* 20, *Part* 1; 1 *R. S.* 634). And in § 6 of the same title, it is enacted that no person who, by reason of lunacy or otherwise, is furiously mad, or so far disordered in his mind as to be dangerous *if permitted to go at large*, etc.

The above section (6) was intended to provide for cases where such committee fails to discharge his duty, or where there is no committee, the party not having any property. In the latter case, the superintendents of the poor being the legal guardians of all paupers, it is made their duty to

ascertain by judicial inquiry whether such lunatic be, in fact, a pauper or an indigent (§ 14), or whether he has been abandoned by his committee against whom an action would lie for his support.

The only public asylums, other than State, to which a case of acute insanity occurring in a pauper can now be legally sent, are those erected in counties having special legislative authority to care for all their own insane. There are at present but three counties so empowered, viz., New York, Kings and Monroe. Cases of chronic insanity similarly discovered in paupers must be sent to the Willard Asylum (*chap. 342 of the Laws of 1865*, § 10), except in such counties as are authorized, as above stated, to care for their own insane, or in such as have been, or may hereafter be, exempted by the State Board of Charities, pursuant to § 1 of *chap. 713 of the Laws of 1871*.

There being also several State lunatic asylums,*to any one of which a county patient may be sent, the question of selection is one which may turn upon distance and cost of transportation, particular system of medical practice, as in the case of the Homœopathic asylum, or cost of maintenance. Hence it is eminently proper that the supervisors of each county should be empowered to make choice, not only of the particular State asylum to which they prefer that their county poor should be sent, but also, in case any counties choose to contract with adjoining counties for boarding non-resident lunatics, that then such boards of supervisors should have the authority to make such contracts.

2. As to private asylums, there is nothing prohibiting superintendents of the poor, who may find it for the interests of the county to do so, from committing lunatics to the care of such institutions. In the county of Queens it has been customary for many years to board the pauper insane at a private farm-house, special accommodations being provided for them; and lunatics of one county, in the absence

of suitable quarters there, are often boarded in an adjoining one under a contract between the proper authorities. Such power to contract is sometimes specially granted by legislative enactment, as was formerly the case with Genesee county. (*Chap. 298, Laws of 1860, § 1; chap. 101 of 1862, and chap. 161 of 1863.*) And was recently given to Orange county by chap. 363, Laws of 1877.

§ 7. It shall be the duty of the overseers of the poor or constables to whom such warrant shall be directed, to procure a suitable place for the confinement of such lunatic as therein directed pursuant to the preceding section, but in no case shall any lunatic be confined in any other place than a State lunatic asylum or public or private asylum duly approved as aforesaid, for a longer period than ten days.¹

PLACES OF DETENTION AND CLASSIFICATION OF LUNATICS.

1. As before said, a lunatic dangerous to himself or to others may be arrested by any one and temporarily detained in any suitable place, provided it be done in a humane manner, until his condition can be legally inquired into. But he cannot be *retained* for more than *ten days* in *any* place, except a State lunatic asylum, or such county asylums as have been authorized by *legislative* enactment to care for all their own insane.

The condition of such lunatic *must* be inquired into, and his removal to some asylum as above stated *must* be effected within *ten days*. Questions relating to convenience of county or town officers, to distances from State asylums, or to costs of transportation, do not justify any omission to comply with the foregoing provisions. The law is imperative as well as mandatory in its language, and admits of no exception, save where, from dangerous illness, the life of the person would be imperiled by his immediate removal. But as soon as it can be done with safety, it must be. At this point, however, our municipal law, seeking the greatest possible good for the insane, makes a distinction between cases of *acute* and cases of *chronic* insanity. This distinction is founded upon the medical experience of the curability of recent insanity by early treatment. All persons

whose insanity has lasted *less than one year* are included in the class of *acute* cases, and these, by reason of their assumed curability, *must* be sent to some State lunatic asylum, other than the Willard, within *ten* days. No exception to this provision is permitted outside of those counties having special *legislative* authority to treat all their own insane.

The following is the act by which this discrimination of lunatics into a *recent* and into a *chronic* class is legislatively established :

“The county judges and superintendents of the poor in every county of the State, except those counties having asylums for the insane, to which they are now authorized to send such insane patients by special legislative enactments, are hereby required to send all indigent or pauper insane coming *under their jurisdiction, *who shall have been insane less than one year*, to the State Lunatic Asylum.” (§ 11 of chap. 342 of the Laws of 1865.)

As in that year there was but one State lunatic asylum (that at Utica), all cases of recent insanity, except as above limited, had to be sent there. The subsequent erection of the Hudson River State Hospital at Poughkeepsie, and of the Homœopathic State Asylum at Middletown, renders them equally proper asylums for that class of cases.

§ 8. No person, who by reason of lunacy or otherwise, is so far disordered in his mind, as to be dangerous to himself or others, shall be committed as a disorderly person to any prison, jail, house of correction, or confined therein unless an agreement shall have been made for that purpose with the keeper thereof ; and no such lunatic or person disordered in his mind shall be confined in the same room with any person charged with or convicted of any crime, nor shall such lunatic be confined in any prison, jail or house of correction for more than ten days.

1. The object of this provision is to secure in advance the preparation of some suitable apartment for the confinement of any dangerous lunatic, pending his removal to some asylum. Cases of *delirium tremens*, although not technically to be classed among the really insane, have still to be often arrested and confined under that designation. And as it may happen that after repeated attacks of this kind, the party ultimately falls into a condition of acute mania,

he should be treated as a lunatic from the start and until his rapid recovery shows him not to have been so. The annual report of the Superintendent of the State Lunatic Asylum at Utica, for 1872, shows that of those patients who were discharged during that year, *fourteen* were not insane when admitted. Three of these were cases of feigned insanity to escape punishment for crime, and the rest were drunkards whose vagaries and violence were mistaken for insanity. All these were committed under public authority and on certificates of insanity on trial by jury."

§ 9. If any person being of disordered mind and committed as a dangerous lunatic to any prison, jail or house of correction as set forth in the preceding section shall continue to be insane at the expiration of ten days he shall be sent forthwith to some State lunatic asylum or to such public or private asylum as may be approved as aforesaid.

[The county judges and superintendents of the poor in every county of the State, except those counties having asylums for the insane, to which they are now authorized to send such insane patients by special legislative enactments, are hereby required to send all indigent or pauper insane coming under their jurisdiction, who shall have been insane less than one year, to the State Lunatic Asylum. (*Chap. 342, of the Laws of 1865, § 11.*)]

This latter section, although it does not appear in the revision of 1874, and is not included in the last edition of the Revised Statutes, is still in force as an explanatory provision intended to re-affirm already existing enactments (§§ 9 and 14), expressed in this Title. It originally appeared as § 11, in the Willard Asylum act (*chap. 342, of 1865*), for the purpose of defining by words of exclusion the *chronic* pauper insane to which that act was intended to apply. At that date there was but one State lunatic asylum in existence. At present there are several, consequently the word "*some*" should be substituted for "*the*" before State Lunatic Asylum.

§ 10. Any overseer of the poor, constable, keeper of a jail or other person who shall confine any lunatic in any other manner or in any other place than such as are herein specified shall be deemed guilty of a misdemeanor, and on conviction thereof shall be liable to a fine not exceeding two hundred and fifty dollars or to imprisonment not ex-

ceeding one year, or to both, at the discretion of the court before which the conviction shall be had.

§ 11. If any lunatic, committed under the provisions of this article, or any friend in his behalf, be dissatisfied with any final decision or order of a county judge, special county judge, surrogate, judge of the Superior Court or Court of Common Pleas of a city, or police magistrate,¹ he may, within three days after such order or decision, appeal therefrom to a justice of the Supreme Court, who shall, thereupon, stay his being sent out of the county, and forthwith call a jury to decide upon the fact of lunacy.² After a full and fair investigation, aided by the testimony of at least two respectable physicians, if such jury find him sane, the justice shall forthwith discharge him, or otherwise he shall confirm the order for his being sent immediately to an asylum. In case any county judge, special county judge, surrogate, judge of the Superior Court or Court of Common Pleas of a city, or police magistrate, refuses to make an order for the confinement of any insane person, proved to be dangerous to himself or others if at large, he shall state his reasons for such refusal in writing, so that any person aggrieved may appeal therefrom to a justice of the Supreme Court, who shall hear and determine the matter in a summary way or call a jury as he may think most fit and proper.

1. Although the power to fully commit lunatics to asylums is, by § 1, withdrawn from both police magistrates and justices of the peace, neither of whom constitute courts of record, still, dangerous lunatics running at large may be arrested, like any other disorderly persons, under warrants issued by such magistrates and detained for a period not exceeding ten days in any suitable place except an asylum, pending judicial inquiry into their condition. (*Williams v. Williams*, 4 T. & C., N. Y. S. C. R. 251.)

2. The right to demand a jury is in affirmance of the old common-law doctrine, that when a man was charged with being an idiot or lunatic, proceedings against him being in the nature of a forfeiture to the Crown, a writ *de idiota inquirendo* was issued to make inquisition thereof, and the same must be tried by a jury of twelve men. (*Fitzherbert*, N. B. 232; 1 Bl. Comm. 303.)

§ 12. If such lunatic is not possessed of sufficient property to maintain himself, it shall be the duty of the father, mother or children of such lunatic, if of sufficient ability, to provide a suitable place for his confinement, and to confine and maintain him in such manner as shall be agreeable to the provisions of this act. But in case his relatives are not of sufficient ability to maintain him, then the superintendent of the poor of the county shall, upon his order, send such pauper-luna-

tic to any State asylum, or to such public or private asylum as may be approved by a standing order or resolution of the supervisors, within ten days.¹

1. The duty of relatives by consanguinity to maintain each other in times of need, is not suspended in law by the intervention of insanity. Hence, although it may neither be safe, nor expedient, nor desirable, to retain a lunatic in a private family, he cannot on that account be cast as a burthen upon the county so long as his relatives have means to maintain him. This principle was fully sustained in the case below cited, where it was held, that :

It being the duty of a father to support and care for his lunatic daughter, which duty, if he be of sufficient ability, he is compellable to perform, when it becomes necessary to prevent the burden of her maintenance from being cast upon the town, he may either keep her at his own house, or he can make a valid contract with some one else to keep her for him elsewhere.

Where the father of such a lunatic, who was not a pauper for whose support the county was chargeable, but whom he was himself bound to support and maintain, took her to the county poor-house, under an agreement made by him with the superintendents of the poor to pay them a specified sum per week for her board; held, that this was a valid contract, and that the father was liable thereon.

Such a contract, made by superintendents of the poor of a county in which the poor are not a county, but a town charge, is not against public policy, or contrary to any positive statute, and, although it is in excess of the superintendents' authority, is neither criminal nor corrupt.

A father having left his lunatic daughter at the poor-house, under such an agreement, the superintendents of the poor have a right to keep her until he shall take her away, or it becomes proper to discharge her. A mere notice from him to the superintendents that he will no longer be responsible for her support, given at a time when she is in

a condition rendering it dangerous to set her at large, will not relieve him from liability. For they cannot legally discharge a lunatic in such a condition, and a parent who has been able to support a lunatic child cannot shift that duty upon the county before establishing the fact of his inability in the manner provided by law.

But a lunatic kept in a county poor-house or asylum, by contract alone, may be taken away from there without an order from a county judge, or judge of the Supreme Court, directing it, pursuant to the statute. (*Laws of 1865, ch. 353, § 3.*) That statute was intended to embrace only those persons who are in an asylum under the authority conferred upon the officers to confine them there, in the performance of their official duties. (*Alger et al. v. Miller, 56 Barb. 227.*)

§ 13. The overseers and superintendents of the poor shall have the same remedies to compel such relatives to confine and maintain such lunatic, and to collect the costs and charges of his confinement, as are given by law in the case of poor and impotent persons becoming chargeable to any town.¹

1. If a lunatic wife is chargeable, *semble* that the superintendents or overseers must exhaust their remedy by action against the husband, before they can proceed against him in equity. (*Pomeroy v. Wells, 8 Paige's Ch. 406; Alger et al. v. Miller, 56 Barb. 227, cited in note to § 12.*)

§ 14. When a person in indigent circumstances, not a pauper, becomes insane, application may be made in his behalf to any county judge, special county judge, judge of a Superior Court or Common Pleas of the county where he resides, and said judge shall fully investigate the facts of the case, both as to the question of his indigence as well as to that of his insanity. And if the judge certifies that satisfactory proof of his insanity has been adduced, and that such person has become insane within one year next prior to the granting of the order of admission, and that his estate is insufficient to support him and his family (or, if he has no family, himself,) while under the visitation of insanity, then it shall be the duty of any judge before whom an application for that purpose is made, to cause reasonable notice thereof, and of the time and place of hearing the same, to be given to one of the superintendents of the poor of the county chargeable with the expense of supporting such person in a State asylum, if admitted; and he shall then proceed to ascertain when such person became insane, and shall state in his certificate that satisfactory proof has been adduced before

him that such person became insane within a year next prior to the date of such certificate. On granting such certificate the judge may, in his discretion, require the friends of the patient to give security to the superintendent of the poor of the county to remove the patient from the asylum at the end of the two years, in case he does not sooner recover. When a patient who is admitted into an asylum on the certificate of any judge given as hereinbefore recited has remained in such asylum two years and has not recovered, the superintendent of the asylum shall send a written notice to the county judge of the county from which he was sent, that such patient has remained in the asylum two years and has not recovered, and that, in case he is not removed therefrom, the expense of his support will be chargeable to the county until he is so removed, and such expense shall be chargeable to the county accordingly. But in every case where a patient, admitted into an asylum as hereinbefore provided, shall have remained there two years and has not recovered, the managers of the asylum may, in their discretion, cause such person to be returned to the county whence he came, and charge the expenses of such removal to the county. The judge granting said order of indigence shall file all papers belonging to such proceedings, together with his decision, with the clerk of the county and report the facts to the supervisors, whose duty it shall be, at their next annual meeting, to raise the money requisite to meet the expenses of support of such indigent lunatic.¹ (*Chap. 135, Laws of 1842, § 26 ; chap. 650, Laws of 1857, § 2.*)

1. The law of *indigence* as distinct from pauperism was first introduced among our lunacy statutes in chap. 135 of the Laws of 1842, § 26. It was designed for the benefit of that laboring population which is only self-supporting while employed, and whose small earnings do not usually permit sufficient accumulation to enable them to maintain themselves during such long periods of physical incapacity as insanity entails. Hence such persons are accorded a temporary support from the *county* for a specified time, and the supervisors are authorized and required to raise the funds necessary for their maintenance in an asylum.

This support being a *county* charge, cannot, as in the case of paupers, be cast upon any particular town in which such indigent lunatic may have had a residence. The distinction between town and county poor does not reach the class of indigents. "Where," therefore, a resident of one of the towns of Genesee county being "in indigent circumstances" but not "a pauper" nor "furiously mad" was admitted into the State Lunatic Asylum on the certificate

of the first judge, pursuant to the 26th section of the act passed April 7th, 1842 (*chap.* 135), and was supported there at the expense of the county, held, that the county could not charge the expense to the town." (*People ex rel. Sup. of Alexander v. Sup. of County of Genesee*, 7 Hill, 171; *Sup. of Monroe Co. v. Budlong*, 51 Barb. 493.)

§ 15. When an insane person in indigent circumstances, not a pauper, shall have been sent to any State asylum by his friends, who have paid his bills therein for six months, if the superintendent shall certify that he is a fit patient and likely to be benefited by remaining in the institution, the supervisors of the county of his residence are authorized and required, upon an application under oath in his behalf, to raise a sum of money sufficient to defray the expenses of his remaining there another year, and to pay the same to the treasurer of the asylum. And they shall repeat the same for one year more upon like application and the production of a new certificate of like import from the superintendent of such asylum.

§ 16. The expense of sending any lunatic to a State asylum, and of supporting him there, shall be defrayed by the county¹ or town to which he may be chargeable. If chargeable to a county, or to any town whose poor moneys are required to be paid into the county treasury, such expense shall be paid by the county treasurer out of the funds appropriated to the support of the poor belonging to such county or town, after being allowed and certified by the county superintendents. If such lunatic be chargeable to a town whose poor moneys are not required to be paid into the county treasury, such expense shall be paid by the overseers of the poor thereof.

§ 17. The overseers of the poor of any city or town shall have the same remedies to compel the committee or guardian of the estate of any lunatic to confine and maintain such lunatic, and to collect of such committee the cost and charges of his confinement and support, as are given in the preceding sections against the relatives of such lunatic.² And the court of General Sessions of the Peace of the city or county shall make orders against such committee personally, and enforce them in the same manner as against the relatives of any poor person, so long as such committee has any property in his hands, for the support of such lunatic.

1. The board of supervisors of any county are authorized to abolish or revive the distinction between the town or county poor of such county in the manner provided by law. (*Chap.* 194, *Laws of 1849*, § 4; 2 *R. S.*, *Part 1*, *Ch.* 20, *Tit.* 1, § 43, 6th *Edn.*) In the absence of any such distinction, "the poor having a settlement in any town in such county shall be supported at the expense of such town; and the poor not having such settlement shall be supported

by the county in which they may be." (2 *R. S.*, *Part 1*, *Ch.* 20, *Tit.* 1, § 47, 6th *Edn.*)

The same rule has been laid down under a similar statute in Pennsylvania. (*Township of Franklin v. Penn. St. Lunatic Hosp.*, 30 *Penn. St.* 522; *Shenango Township v. Wayne Township*, 34 *Ib.* 184; *Wertz v. Blair County*, 66 *Ib.* 18).

2. See note to § 13.

§ 18. None of the foregoing provisions shall be deemed to restrain or abridge the power and authority of the Supreme Court, the Superior Court and the Court of Common Pleas of the city and county of New York, or the Superior Court of [the city of] Buffalo¹ or the City Court of Brooklyn or any County Courts, concerning the safe-keeping of any lunatics or the charge of their persons or estates.

1. The words in brackets are superfluous, and therefore a misnomer. (See *Constitut'n of N. Y.* [1846], *Art.* 6, § 12.)

§ 19. The county superintendents of the poor shall have all the powers and authority herein given to overseers of the poor of any town.

The county superintendents of the poor, in those counties where a distinction is made between town and county paupers, have not, in consequence, the same scope of authority as in other counties. But in relation to the pauper insane, they are the proper representatives of the county in its dealings with the State asylums in which such insane patients are treated. They also keep the accounts between the county and its several towns for the support of their poor. (*R. S.*, *Part 1*, *Ch.* 20, *Tit.* 1, § 47.) Their duties and those of the overseers are, therefore, largely reciprocal. (*Pomeroy v. Wells*, 8 *Paige's Ch.* 406).

ARTICLE SECOND.

Commitment of the insane by criminal process.

§ 20. If any person in confinement under indictment for the crime of arson, murder or attempt at murder or highway robbery, shall appear to be insane, the Court of Oyer and Terminer in which such indictment is pending shall have power, with the concurrence of the presiding judge of such court, summarily to inquire into the sanity of such person and the degree of mental capacity possessed by him,¹ and

for that purpose may appoint a commission² to examine such person and inquire into the facts of his case and report thereon to the court, and if the said court shall find such person insane, or not of sufficient mental capacity to undertake his defense, they may by order remand such person to such State lunatic asylum³ as in their judgment shall be meet, there to remain until restored to his right mind, when he shall be remanded to prison and criminal proceedings be resumed, or otherwise discharged according to law. (*Laws 1871, ch. 666, § 1.*)

1. There is nothing new in the principle underlying this provision. By the common law, if it be doubtful whether a criminal, who, at his trial, in appearance, is a lunatic, be such in truth, or not, it shall be tried by the jury who are charged to try the indictment, by an inquest of office, to be returned by the sheriff of the county wherein the court exists. (*Bac. Abr., "Idiot;" 1 Lewin, 239; Wharton Cr. L., § 53.*) The statute has very properly modified the common law procedure by substituting a commission of experts for a jury of non-experts. The experience of every day adds weight to the conviction that a jury of laymen is an unsafe tribunal to which to commit an issue of insanity. So far from such a tribunal affording any protection to personal liberty, it happens to operate so frequently in an opposite and oppressive direction that its findings have ceased to have any weight in the eyes of scientists. As an example of the perils to personal liberty from jury trials in issues of insanity may be cited the report of the superintendent of the State Lunatic Asylum at Utica for 1872, which shows that to this *one* asylum during that year *fourteen* persons were committed as lunatics upon verdicts of juries, none of whom were insane, and all of whom had to be discharged as improperly and erroneously adjudged so. In England such trial by jury is very generally dispensed with.

This section, therefore, simply provides a method for determining whether a party be or not mentally competent to be put upon trial under that provision of the Revised Statutes, which enacts that "No act done by a person in a state of insanity can be punished as an offense, *and no insane person can be tried*, sentenced to any punishment, or

punished for any crime or offense while he continues in that state." (2 *R. S.*, Part 4, Ch. 1, Tit. 7, § 2, 6th Edn.) It sometimes happens that the insanity of a person charged with crime (particularly one whose course of life has been habitually depraved and bestial) is not discovered until he has been arrested and kept under observation for some time. Meanwhile, not having been judicially declared a lunatic, there is nothing that forbids the finding of an indictment against him. (*Wharton's Cr. L.*, § 492, 4th Edn.)

Therefore, in *Freeman v. The People* (4 Denio, 9), it was held that where a prisoner was tried for murder four months after the crime was alleged to have been committed, it was competent for the defendant to prove that he was insane at the time of the trial, with a view to establish the defense of insanity when the act was committed.

2. A commission appointed under this section differs from an ordinary commission *de lunatico*, in that it is not *ex parte* and upon petition, but rather in the nature of a compulsory reference upon questions incidentally arising, and where such reference is necessary for the information of the court. The commissioners thus appointed are not properly referees, since their judgment is not an award, but simply an opinion upon the facts, and they stand, therefore, in the position of *amici curiae*, or assessors. Whether they should be sworn faithfully and fairly to inquire into the matters submitted to them, before entering upon their duties, is a question to be left to the discretion of the court. As they are neither witnesses nor referees, called upon to decide finally an issue raised, it would seem that the taking of a preliminary oath is not essential. Besides, their labors are presumed in legal intendment to be performed under the eye of the court appointing them, and in that sense they form part of the court *quoad hoc*. The commissioners have authority to subpœna and examine witnesses, and may apply for compulsory process, if necessary, to compel their

attendance. They also, and of necessity, have the right of access to the prisoner, but must examine him at the place of confinement. Upon the conclusion of their labors, the commissioners should present a written report, with their signatures severally attached, to the court appointing them. And to this report should be appended the minutes of the evidence taken by them upon the examination.

In the case of a commission appointed by the Governor, under authority of the next section, the proceedings will vary somewhat. There, after a final judgment upon a certiorari or writ of error, the authority of the court being exhausted, the Governor may issue a commission to inquire into the mental sanity of the prisoner. The commissioners thus appointed need not be sworn, but before proceeding to the discharge of their duties they should duly notify the sheriff in whose custody the party is to produce him before them, at the place of his confinement, and also issue the necessary subpoenas to witnesses. When all parties are assembled on the day of hearing, they should proceed to open the commission by making proclamation, and reading the Governor's warrant to them to inquire into the mental sanity of the prisoner. The prisoner need not be present at the taking of the testimony, and no counsel are to be heard, although it is usual on such occasions to invite both the district attorney and the prisoner's counsel to be present. If any fraud or collusion between witnesses and the prisoner are suspected, the witnesses should be examined apart. The report of the commissioners to the Governor should be made in writing, signed by each one of them, and the minutes of evidence taken upon their examination should be appended thereto. In reports made by commissions of the above kinds, either to courts or the Governor, it is not within the province of the commissioners to make any recommendations touching the final disposition of the case. Their duty is to state simply their findings upon all the facts in evidence, but not to offer any suggestions by

way of influencing the judgment of the tribunal which appointed them.

3. The State Asylum for Insane Criminals being organized as a hospital branch of the State prison department, and intended only for the care and treatment of *convicts*, it should be made a matter of serious consideration with judges who sometimes commit *un-convicted* persons to its keeping, as to what class of insane persons being under indictment, and before trial, or acquitted on the ground of insanity, should be sent there. The mere fact of an indictment does not prove guilt, else there would be no need of a trial by the country; and as innocence is always presumed until the contrary is proved, no person, though indicted, can be committed to a State prison pending his trial and conviction. By what system of logic, therefore, any un-tried insane person, irrespective of his previous character, is sent to this asylum, we fail to see; yet it is often done. It is doubtless true that if an old criminal, who has served one or more terms in the State prison or penitentiary, becomes insane pending the trial of a fresh indictment against him, he might, with some propriety, be sent there; but it should be otherwise with a person never before indicted. In respect to such a person the theory of innocence, based upon previous good character and legal presumptions, justify no such disposition of his custody as that. A court has no authority to impress a criminal character upon an un-convicted person by decreeing his association with convicts. Such an arbitrary exercise of power is more than an error. If it was necessary to give courts a discretionary power in choosing the place of confinement of an insane culprit, that privilege carries with it the duty of being guided by a serious consideration of all the facts relating to the insane person, rather than by the name or enormity of the offense.

It seems desirable to keep in mind the fact that the commission of an offense by an insane person does not consti-

tute that person a criminal, for *actus non facit reum nisi mens sit rea*. Nor does the offense prove that the party is naturally inclined to the commission of crime, as for instance infanticide committed by a mother while laboring under puerperal insanity, or a woman made insane by the shock of seduction and abandonment, and killing her seducer; or arson committed by young persons at the development of puberty, and who are the victims of epilepsy; or, again, innominate offenses committed by women under the overpowering and loathsome cravings of pregnancy. These are cases which spring from an inherent weakness of female nature at periods of great evolutionary crises. No moral training can prevent such accidents, since they belong to the sphere of the convulsions. Such persons should not be placed in the Asylum for Insane Criminals so long as we have other asylums where they can be as safely kept.

§ 21. The Governor shall possess the same powers conferred upon courts of Oyer and Terminer in the case of persons confined under conviction for offenses for which the punishment is death.¹ And whenever any person under sentence of death shall be declared insane and irresponsible, by a commission duly appointed for that purpose, the Governor may, in his discretion, order his removal to the State Lunatic Asylum for Insane Criminals, there to remain until restored to his right mind, and it shall be the duty of the medical superintendent of such asylum, whenever, in his opinion, said convict is cured of his insanity, to report the fact to the State Commissioner in Lunacy and a justice of the Supreme Court of the district in which said asylum is situated, who shall thereupon inquire into the truth of such fact, and if the same be proved to their satisfaction, they shall so certify it under their official hands and seals to the clerk of the court in which such convict was sentenced, and cause him, the said convict, to be returned to the custody of the sheriff of the county whence he came, and at the expense thereof, there to be dealt with according to law.²

1. Laws 1871, chap. 666, § 2.

2. Amended in Laws 1876, ch. 267, § 1, beginning at "*And,*" *whenever*.

Previous to the passage of this amendment, when the Governor had ordered the removal of any insane convict under sentence of death to a State asylum, and the day for executing such sentence had passed, there was no juris-

diction to which the record of this suspension could be remitted. The court below had exhausted its powers in the sentence. That being set aside *indefinitely*, the removal of such a lunatic to an asylum by the Governor became tantamount to a pardon to take effect upon his recovery, since there was no authority to send him back, for the purpose of being re-sentenced.

(See *cases of the People v. Buckhout, Execut. Chamber Records, Aug., 1871; People v. Montgomery, Ib., Oct., 1872, Am. Jour. Ins., Jan., 1873; People v. Waltz, Ib., May, 1874, reported in Am. Jour. of Insanity for July, 1874; People v. Staudermann, Ex. Ch. Rec., Dec., 1875, reported in Am. Jour. Ins. for April, 1876; People v. Ruloff, Ex. Ch. Rec., May, 1871; Am. Jour. Ins., April, 1872.*)

§ 22. The costs of any commission of lunacy appointed pursuant to the provisions of this article shall be a charge upon the county in which the same shall have been executed; and the certificate of the court by which such commission shall have been appointed, shall constitute a legal voucher thereof in the hands of the county treasurer. Provided, nevertheless, that the costs of all commissions appointed by the Governor shall be defrayed from the fund appropriated for the contingent expenses of the executive department. (*Laws 1875, ch. 574, § 2.*)

§ 23. Any person now or hereafter confined in either of the State lunatic asylums upon the charge of arson or murder, or attempt at murder, or highway robbery, under the provisions of this act or any former act, may, upon the application of any superintendent of an asylum, be brought before a justice of the Supreme Court, who may order his removal to the State Lunatic Asylum for Insane Criminals at Auburn. The provision of the preceding section, requiring the county to defray the expenses of a person sent to either asylum, shall be equally applicable to similar expenses arising under this section.

§ 24. Any person who is now, or shall be hereafter, confined in any penitentiary, and who shall appear to be insane, may, on application of the superintendent thereof, be transferred to the State Lunatic Asylum for Insane Criminals at Auburn, under an order of any justice of the Supreme Court, or the county judge of the county in which such penitentiary is located, upon satisfactory evidence that such person is insane; and the judge shall thereupon order his removal forthwith to said asylum, where he shall remain until recovered or otherwise discharged according to law.

§ 25. The penitentiary from which such convict (if under sentence for a misdemeanor) shall have been transferred, shall be liable for the expenses of his care and maintenance during the time he shall remain in said asylum, provided that he is removed therefrom before the expiration of his sentence. If he shall continue insane after the ex-

piration of the time for which he was sentenced, then the county from which he was sent to said penitentiary shall pay his expenses, as hereinbefore provided in section twenty-two of this act. (*Laws 1875, ch. 574, § 3.*)

The old section 22, which was amended by *omitting* it, and introducing another in its stead, was a superfluous one. Its purview is fully reached by §§ 20-26 and 31. The provision in relation to support by the county, and recovery by it for the same, is fully covered by the last clause of section 26. This number should be accordingly substituted for 22 referred to above.

§ 26. If any person in confinement under indictment or under sentence of imprisonment, or under a criminal charge, or for want of bail for good behavior, or for keeping the peace, or for appearing as a witness, or in consequence of any summary conviction, or by order of any justice, or under any other than civil process, shall appear to be insane, the county judge of the county where he is confined shall institute a careful investigation, call two respectable physicians and other credible witnesses, invite the district attorney to aid in the examination (and if he deem it necessary, call a jury, and for that purpose is fully empowered to compel the attendance of witnesses and jurors), and if it be satisfactorily proved that he is insane, said judge may discharge him from imprisonment and order his safe custody and removal to a State asylum, where he shall remain until restored to his right mind; and then the superintendent shall inform the said judge and district attorney, so that the person so confined may, within sixty days thereafter, be remanded to prison and criminal proceedings be resumed or otherwise discharged, or if the period of his imprisonment shall have expired, he shall be discharged. When such person is sent to an asylum, the county from which he is sent shall defray all his expenses while there and of sending him back if returned, but the county may recover the amount so paid from his own estate, if he have any, or from any relative, town, city or county that would have been bound to provide for and maintain him elsewhere.' (*Laws 1842, ch. 135, §§ 31, 32; as amended by § 29, ch. 280 of 1847, and the present act.*)

1. A lunatic before office found may unquestionably be indicted, the province of the grand jury being merely to inquire *ex parte*, whether there is reason to believe that an offense against the laws has been committed, and whether a certain party is associated therewith as its perpetrator. They simply present him to the country for trial as the culprit. In England it is an established rule that a grand jury have no authority by law to ignore a bill for murder on the ground of insanity though it appear plainly from

the testimony of witnesses on the part of the prosecution, that the accused was in fact insane. If they believe that the acts committed would, in the case of a person of sane mind, amount to murder, it is their duty to find the bill. (*Whart. Cr. Law*, § 924; *Reg. v. McNaughton*, 8 *C. & P.* 195.)

It will be noticed that trial by jury of the question of insanity is not required, it being left optional with the county judge to summon one or not, according as he deems it necessary. And this is in accordance with the doctrine laid down in *Smith v. Carll* (5 *Johns. Ch.* 118). Should a *nol. pros.* be afterward entered to the indictment, the lunatic upon his recovery may be discharged in the manner provided by law. (§ 33; *Tit. 3rd*, § 25.) Or if he continues insane at the expiration of his sentence of imprisonment, he may be dealt with as any ordinary lunatic — that is to say, he may be returned to the custody of his committee or relatives; or if a pauper, to the custody of the superintendents of the poor of the county whence he came.

This section also enacts that the committee of any insane convict, provided he has received sufficient funds, may be compelled to bear the expenses of his maintenance, clothing, etc., while in a State lunatic asylum. And an action to recover back such expenses may be maintained against the committee by the county from which he was sent, and which has advanced the money for his support. Thus, a person convicted of murder, before sentence was passed, was found to be insane, discharged from imprisonment and sent to the State lunatic asylum. His expenses there were paid by the treasurer of the county from which he was sent. Held, that the supervisors of the county could recover from the committee of the criminal's estate the amount so advanced, it being proved that such committee held property of the criminal, more than sufficient for the purpose. (*Supervisors of Onondaga v. Morgan*, 4 *Abbott's Ct. of Appeals Dec.* 335.)

Wherever the offense committed is one of a *minor grade*, it is not an unfair construction of the above section to say that in counties having legislative authority to care for *all* their own insane (and not merely their chronic), a culprit may be sent to the county asylum. Such an institution is in spirit and in fact a branch State asylum and to that extent fulfills the intent of the statute. But it is otherwise when the offense reaches the grade of a felony. (See *note to § 20.*)

§ 27. If a person imprisoned on attachment or any civil process, or for the non-payment of a militia fine, becomes insane, one of the judges mentioned in the last preceding section of this act shall institute like proceedings in his case as are required in the case provided for in said section; but notice shall be given, by mail or otherwise, to the plaintiff or his attorney, if in the State; and if it shall be proved to the satisfaction of said judge that the prisoner is insane, he may discharge him from imprisonment and order him into safe custody and to be sent to a State asylum. The provisions of the last preceding section, requiring the county to defray the expenses of a patient sent to a State asylum, shall be equally applicable to similar expenses arising under this section.¹ (*Laws 1842, ch. 135, § 32, as amended by present act.*)

1. An order of discharge must direct the prisoner to be sent to some State lunatic asylum, and an omission to so direct renders such order void, because the duty of sending to the asylum is inseparably connected with the power to discharge. (*Bush v. Pettibone*, 4 N. Y. 300; *aff'd*, 5 Barb. 273; see, also, *case of Wm. Hoffman*, chap. 322, *Laws of 1872.*)

§ 28. Persons charged with misdemeanor and acquitted on the ground of insanity may be kept in custody and sent to a State asylum, in the same way as persons charged with crime, and their expenses shall be paid in the like manner. (*Laws 1842, ch. 135, § 34, as amended by present act.*)

§ 29. The boards of supervisors in the respective counties of this State are hereby empowered, and it shall be their duty, annually to fix and determine the compensation to be allowed and paid to officers for the conveyance of juvenile delinquents to the houses of refuge, and of lunatics to the insane asylums, and no other or greater amount than that so fixed and determined shall be allowed and paid for such service. (*Laws 1859, ch. 254, § 1.*)

PLEA OF INSANITY AS AN ANSWER TO AN INDICTMENT.

§ 30. Whenever any person in confinement under indictment for the crime of arson, murder, or attempt at murder, or highway robbery, desires to offer the plea of insanity as a general traverse and his whole defense to such indictment, he shall present such plea at the time of his arraignment, and at no other stage of the trial but this, shall such plea or defense be received or entertained by the court; and the court before whom such trial is pending shall have power, with the concurrence of the presiding judge thereof, to appoint a commission to examine such person and to inquire and report to the court aforesaid, upon the fact of his mental sanity at the date of the offense with which he stands charged. The commission aforesaid shall institute a careful investigation, call such witnesses as may be necessary, and for that purpose is fully empowered to compel the attendance of witnesses.

Upon the report of said commission, if the court before whom such indictment is pending shall find that such person was insane and irresponsible at the date of the offense with which he stands charged, the court aforesaid shall order his removal to some State lunatic asylum, there to remain for observation and treatment, until such time as, in the opinion of a justice of the Supreme Court, it is safe, legal and right to discharge him.

This new provision was introduced to simplify and lessen the costs of trials where the insanity of the defendant is the sole answer to the indictment. It is, in many senses, a corollary to § 20 and § 26, where the court may inquire summarily into the sanity of a party under indictment for certain enumerated crimes, or even under any criminal charge. The matter is to be tried, therefore, as a preliminary issue, because at common law the fact might be pleaded and replied to *ore tenus* and a venire awarded, returnable instant, in the nature of an inquest of office. (*Foster*, 46; 1 *Lew.* 61; *Russ. on C. & M. by Greaves*, 14; *Whart. Cr. L.*, § 53.) There are precedents also to show that in issues of lunacy the inquiry should be extended back, in order to determine how long the insanity had existed, and if, under section 20, the inquiry can be made upon the party appearing to be insane at the time of trial, it is manifestly proper that the inquiry should be carried back a reasonable time, since it might possibly show the party to have been insane at the date of the criminal act. (*Freeman v. The People*, 4 *Denio*, 9.) Lord COTTENHAM (*In re Whittaker*, 4 *My. & Cr.* 441) said, "that the

law required and the jury were bound to ascertain the period at which the lunacy began."

In order to simplify proceedings and to enable the defendant to present his defense of insanity at the most proper time, he is required to plead it upon arraignment. This plea, like any other, is a matter upon which the judgment of the court is free to exercise itself. It is not a plea to the jurisdiction so much as a plea in abatement, and it is intended to cover that class of cases of insanity represented at common law by the term "lunatic." It is part of the negative plea of not guilty, and is given merely in rebuttal of the *prima facie* case that the State must make out of guilt and sanity. (*State v. Crawford*, *Am. Law Reg.*, vol. 14, p. 21; *Com. v. Thurlow*, 24 *Pick.* 374; *State v. Bartlett*, 43 *N. H.* 224.)

The term "lunatic," as employed by HALE and COKE (1 *P. C.* 32; *Beverly's case*, 4 *Rep.* 128), and in our day by KENT (*Matter of Barker*, 2 *Johns. Ch.* 232), meant one whose insanity had recurrences of exacerbation and diminution amounting almost to disappearance (*qui gaudet lucidis intervallis*). Science shows that these intervals are merely diminutions in expression of the insanity, and not a suspension or removal of the disorder; for in all conditions of human physiology and pathology there are full and ebb tides, and a lucid interval in insanity belongs to the latter class.

Now, since in this condition a man not under the observation of experts may appear sane enough to be put upon trial, and is not, therefore, included in the provisions of section 20, the present section was introduced to afford him the opportunity of having his mental condition inquired into *in limine*. There can be no question of the right of the court, before which such a plea is made, to appoint a commission to inquire into the fact alleged in this case as well as in that of section 20, because the Revised Statutes (*Part 4, Ch. 2, Tit. 5, § 13*) insure to every party indicted an election as to the matter of his defense. And when thus

interposed in good faith, the court, having in view the ultimate consequences of such a plea, cannot well refuse to appoint the commission. This right on the part of the defendant, and this discretionary power on the part of the court, were fully recognized in *Freeman v. The People* (4 Denio, 9), and it was there held that, while in issues of insanity the most discreet and proper way of determining the question was by trial by jury, other modes might be adopted in the discretion of the court.

The reason of such a rule is obvious, for the object of any trial under an indictment is always to determine whether a party charged with crime shall continue in the custody of the State, to abide its judgment in the matter of penalties to be inflicted upon him, if proved guilty. But when a dangerously insane person, who cannot be legally *out* of the custody of the State, and at the same time cannot be a criminal under its laws, and yet, being indicted, claims that very custody which criminals seek to escape from, why should he be compelled to put himself upon trial for the purpose of determining the very thing which he offers to prove at the outset cannot legally inhere in him, viz., guilt? His plea is in the nature of a plea in abatement, and if it prevails, the indictment must be quashed, because this latter charges crime, while the former charges legal incapacity to commit it. Guilt presupposes sanity as a *sine qua non* (*State v. Pike*, 49 N. H. 431); and the two states of insanity and guilt being simultaneously incompatible, the plea of mental incapacity is part of the negative plea of not guilty which the defendant may always offer in answer to the indictment. (1 *Archbold's Cr. Pl.*, *Waterman's Ed'n*, 359, n.; 2 *Hale's P. C.* 238; 10 *East*, 88; 8 *Smedes & Marshall*, 587.)

Again, no provision is made for a jury trial in the case of the commission to be appointed above, any more than in § 20, because in this case the party does not allege that he is wrongfully deprived of his liberty, nor does he seek to

obtain it through the judgment of his peers. He admits the justice of the custody, but denies the right of the State to couple with it such penalties as are annexed to convictions for crime. The issue here is not one of guilt, but of sanity. He pleads that he was insane at the date of the commission of the offense with which he stands charged, and asks for a tribunal before which he can establish that fact under the statute. But in doing so he must conform to its terms, since there can be no question that the Legislature may alter methods of procedure, and so may specify at what stage of a trial such plea shall be received. (*Constitution of 1846, Art. VI, § 8*)

Should the court, upon the return of the commission, find that the party failed to sustain his plea of insanity, the trial must proceed in the ordinary way, and the party cannot again offer it for the purpose of having it decided by a jury. It is doubtless true that in *Freeman v. The People* it was held that the finding of a jury upon a preliminary issue that the prisoner was *then* sane could not be taken into consideration upon the question of insanity, set up as a defense upon the trial. But that preliminary issue had reference only to the alleged insanity of the prisoner at the *time of the trial*, the object being to raise a presumption in favor of his insanity at the date of his offense.

Under the present section of the statute the issue is the insanity of the party at the time of the crime charged, for that is what the indictment relates to. If he establishes that, he acquits himself. If he fails to do so, and is not even insane at the time of the trial, so as to come within the purview of section 20, then there seems no good reason why he should be allowed to offer the same plea as his sole defense a second time, unless we can find some constitutional right permitting him to do so.

There are grounds, however, on which to doubt whether there be any thing in the nature of a constitutional right to a trial by jury in cases of lunacy, and whether, if this

be so, all procedure of this kind is not the creature of usage or statutory enactment. Certainly, at common law, any one might confine a lunatic (*See page 51, n.*), and our Revised Statutes require the relatives of such a person having no property or committee to provide for his confinement, and to confine him. This they may do in a private house, and without process of law, subject, nevertheless, to damages if they thus imprison one not insane. Under section first, Tit. 1, Art. 1 of the Act of 1874, a party shown to be insane may be committed to an asylum upon the certificates of two qualified medical examiners, duly approved by a judge of a court of record, with whom it is left optional to summon a jury. No one doubts the legality of such proceedings. They are consecrated by time and immemorial usage. In *Smith v. Carll* (5 *Johns. Ch.* 118), Chancellor KENT held that the question of sanity of an alleged lunatic could always be tried without a jury, provided the court could decide of itself and to its own satisfaction upon the evidence; and he cites a number of English cases in support of this doctrine. (*Shelford, p. 37, note a.*)

But the defendant who fails to establish his insanity by commission at the outset, does not thereby lose the opportunity of showing a qualified responsibility only, before the jury appointed to try the indictment. For, under a mixed defense, he may show provocation with heat of blood acting upon an inherited insane temperament, and therefore upon a mind weakened by its connection with a weak brain; or he may show terror amounting to panic fear (owing to this temperament), and a belief of impending destruction of his life, not likely to occur in a stronger mind. Or he may show impulse passing beyond control, owing to some disordered condition of his brain, not intentionally produced for the purpose of committing a felony. Or, again, he may show that he was once insane, and discharged, as apparently cured; or that he had suffered from forms of fever habitually developing delirium in him as an index of

easily induced cerebral congestion; or that he was an epileptic; or that he had received blows upon, or wounds of the head of a serious character, followed by unmistakable symptoms of recurring disturbance of the brain and of his habits of conduct and feeling; or he may show that his mind has been weakened by often repeated excesses in drink or opium, which, whether followed by delirium tremens or not, tend permanently to lower its power of self-control when under any sudden violent excitement. All these conditions he may show, and thus, without proving an established status of insanity, may yet give color to the existence of a mental state calculated to lower his power of reasoning and self-control when under strain, and, therefore, in relation to the particular act with which he stands charged. But he cannot show these things as proofs of mental incapacity, unless for the purpose of proving himself to be actually *non compos* (*Patterson v. People*, 46 Barb. 625), and that the statute now requires him to do solely upon arraignment. Hence, the foregoing facts in his mental history would serve only to show qualified responsibility, and to reduce the degree of the offense, but not to establish absolute irresponsibility. (*Roberts v. People*, 19 Mich. 401; *Andersen v. State*, 43 Conn. 514.)

And, if the jury choose to interpret this as implying insanity *quoad hoc*, there is nothing in the statute to forbid it. In that event they must find a special verdict so stating it (§ 31), whereupon the party is committed to an asylum for observation and treatment, his previous acts showing him to be a dangerous lunatic, not safe to be at large. The final disposition of the party is the same in either event.

Reviewing the salient points of the above section we find that in the first instance, a commission is appointed, and the county spared the cost of one or more trials. In the second, the trial goes on in the usual way, save that no commission can be appointed, because no special plea of insanity can there be interposed. For under rules of plead-

ing at common law, the general issue cannot be pleaded together with a special plea, since this would constitute duplicity. Therefore, the alleged insanity of the defendant being a special plea, must first be heard and determined.

If the accused fails to sustain his special plea, the general issue will then be tried under a *respondeat ouster*, but nothing more, for it is a rule that a party having once pleaded generally, cannot afterward plead specially, because such a plea is not divisible. (2 *Swan*, 626; 2 *Yerger*, 248; 7 *Cox's C. C.* 85; *Whart. Cr. L.*, § 535; 8 *Smedes & Marshall*, 587.) The statute thus gives an alternative course of defense to the party indicted, in which it is also made, for economy's sake, the interest of the prosecution to join, because, whatever may be the issue of the trial, the defendant must eventually remain in the custody of the State.

(See case of *People v. Jenish*, *N. Y. Gen. Sessions*, Dec. Term, 1874, reported in the *Am. Jour. Insanity*, April, 1875; *People v. Dillon*, *N. Y. Oyer and Terminer*, April Term, 1876; *People v. Beno-Ville*, *N. Y. Gen. Sess.*, March Term, 1877.)

§ 31. Whenever any person accused of the crime of arson, murder, or attempted murder, or highway robbery, shall have been acquitted upon trial upon the ground of insanity, the jury shall bring in a special verdict to that effect and so state it in their finding; and the court before whom such trial is had, shall order such person to be committed to some State lunatic asylum, there to remain for observation and care until such time as, in the judgment of a justice of the Supreme Court, founded upon satisfactory evidence, it is safe, legal and right to discharge him.¹

1. The object of this provision is to secure some method for detaining the party under observation until it is judicially ascertained that it is safe to discharge him. Recent acquittals on the ground of a *transitory mania*,* neither preceding nor succeeding the criminal act, but supervening at that moment alone and expiring with the commission of the act, have shown the necessity of providing against the

*The cases of McFarland and Cole in this State, and of Sickles in the District of Columbia, are cases in point.

immediate discharge of such parties from custody. *Semel furiosus semper furiosus præsumitur*. They are dangerous lunatics by their own showing, and of imminent peril to the community, which has a right to enforce their seclusion until satisfied by due process of law that it is "safe, legal and right" to discharge them.*

§ 32. Whenever any insane person in confinement under indictment shall be committed, as hereinbefore recited, to any State lunatic asylum, the county from which he is sent shall defray all the expenses of such person, while at such asylum, and the expense of returning him to such county; but the county may recover the amount so paid from his own estate, or from any relative, town, city or county that would have been bound by existing laws, to provide for and maintain him elsewhere.¹

1. See note to § 26 and case cited.

§ 33. Whenever any insane person in confinement under indictment for arson, murder, or attempt at murder, or highway robbery, or who has been acquitted thereof on the ground of insanity, and has been committed to some State lunatic asylum, pursuant to the provisions of the preceding sections, shall be restored to his right mind, it shall be the duty of the superintendent of such asylum, to give notice thereof to the State Commissioner in Lunacy, who shall thereupon inquire into the truth of such fact, and if the same shall be proved to his satisfaction, he shall so certify it under his official hand and seal to a justice of the Supreme Court of the district in which such asylum is situated, who shall thereupon and upon such other facts as may be proven before him, determine whether it is safe, legal and right that such party in confinement as aforesaid, should be discharged.¹

1. This section is a corollary to section 31, and provides a proper medico-legal tribunal before which the fact of restoration to sanity can be inquired into and judicially determined. The proceedings are in the nature of a *melius inquirendum* on the part of the State.

§ 34. No insane person confined in any county poor-house or county asylum shall be discharged therefrom by any keeper of such establishment, by any superintendent of the poor, or by any other county authority, without an order from a county judge or judge of the Supreme Court, founded upon satisfactory evidence that it is safe, legal and right to make such discharge, as regards the individual and

* The case of Scannell (*N. Y. Oyer and Ter.*, Nov., 1875) would have also, upon his acquittal, led to an immediate discharge but for this provision. His return to sanity had to be judicially established under § 33, hereinafter.

the public.¹ The violation of this provision shall be deemed a misdemeanor, and be punishable by a fine not exceeding five hundred dollars nor less than one hundred dollars, in the discretion of the court. This section shall not apply to the counties of New York and Kings; but no insane person shall be discharged from either of the lunatic asylums of the said counties, without the certificate, in writing, of the physician thereof, which certificate shall be filed and kept in said asylum stating that such discharge is safe and proper.

1. Except in the case of a lunatic kept by contract and as a private patient in a poor-house. Such an one may be removed without an order from a county judge or justice of the Supreme Court. (*Alger et al. v. Miller*, 56 Barb. 227.)

§ 35. The boards of managers of State lunatic asylums are hereby authorized to appoint two or more of the attendants and employees of said asylums as policemen, whose duty it shall be, under the orders of the superintendent, to arrest and return to the asylum insane persons who may escape therefrom.

§ 36. The resident officers of all State lunatic asylums, and all attendants and assistants actually employed therein shall, during the time of such employment, be exempt from serving on juries, and in time of peace from service in the militia, and the certificate of the superintendent shall be evidence of the fact of such employment.

ARTICLE THIRD.

Maintenance of the insane.

§ 37. Whenever any person who is possessed of sufficient property to maintain himself, becomes, by lunacy or otherwise, so far disordered in his senses as to endanger his own person or the person or property of others, it shall be the duty of the committee of his person and estate to provide a suitable place for his confinement, and to confine and maintain him in such manner as shall be approved by the proper legal authority;¹ and in every case of lunacy hereafter occurring, the lunatic shall be sent within ten days to some State lunatic asylum, or to such public or private asylum as may be approved by a standing order or resolution of the supervisors of the county.² The superintendents and overseers of the poor are severally enjoined to see that this provision be carried into effect in the most humane and speedy manner, as well in case the lunatic or his relatives are of sufficient ability to defray the expenses, as in case of a pauper.

1. See note to § 6.

2. *Ib.*; *Supervisors of Onondaga v. Morgan*, 4 Abbott's Ct. App. Dec. 335.

§ 38. When the personal property and the rents, profits and income of the real estate of any idiot, lunatic or person of unsound mind

shall be insufficient for his maintenance, or that of his family, or for the education of his children, it shall be the duty of the committee of his estate to apply, by petition, to the Supreme Court, or to the court having jurisdiction, for authority to mortgage or sell the whole, or so much of the real estate as shall be necessary for that purpose; upon which the same reference and proceedings shall be had, and a like order shall be entered, as directed in section nine of Title second of this act, and the court shall direct the manner in which the proceeds of such sale shall be secured, and the income or produce thereof appropriated.

TITLE SECOND.

CARE OF THE ESTATES OF INSANE PERSONS.

SECTION 1. The Supreme Court¹ shall have the care and custody of all idiots, lunatics, persons of unsound mind and persons who shall be incapable of conducting their own affairs in consequence of habitual drunkenness,² and of their real and personal estates, so that the same shall not be wasted or destroyed, and shall provide for their safe-keeping and maintenance, and for the maintenance of their families and the education of their children out of their personal estates, and the rents and profits of their real estate respectively. And the county court shall have a similar jurisdiction in the care and custody of the person and estate of a lunatic or person of unsound mind or an habitual drunkard resident within the county.

1. In England the custody of the person and estates of lunatics was originally vested in the Crown as *parens patriæ*. But this prerogative could be exercised by any officer to whom a warrant under the King's hand was given for that purpose. It eventually devolved upon the Lord Chancellor, not *virtute officii*, but as the King's delegate, to ascertain the lunacy of any party, upon a petition to him, duly verified by affidavit alleging such a condition. Whereupon a writ *de lunatico* was issued to the sheriff of the county where the alleged lunatic resided, requiring him to try such issue by a jury. As the purpose of this writ was to determine a question of forfeiture to the Crown, the actual control of the person and estate of a lunatic did not begin until office found in its favor. (*Jacob's Law Dict., Idiot*; *Tomlyn's L. Dict., Ib.*; 4 *Bro. Ch. Pr.* 223; *Shelford on Lunatics*, 9; 8 *Rep.* 168.)

But a distinction was made between idiots and lunatics in relation to the results of such finding. In the case of an idiot, the Crown having a beneficial interest, had the custody of his person and lands during his life-time; in the case of a lunatic, the King was a mere trustee, acting as *parens patriæ*, and not taking any thing to his own use.

Judge STORY (*Eq. Jurisp.*, § 1364 *n.*) says, in explanation of the authority of the Lord Chancellor over persons of unsound mind, "that the Lord Chancellor acts merely as delegate of the Crown, and exercising its personal prerogative as *parens patriæ* in Chancery, and not as a court of equity."

Having largely borrowed the forms of our judicature, both equity as well as common law, from that of England, it was at an early day enacted by the Legislature of New York, that "the Chancellor should have the care and provide for the safe-keeping of all idiots and of their lands and tenements, goods and chattels." (2 *Greenl.* 25, A. D. 1788; *Chap.* 30, *Laws of* 1801; 1 *Rev. Laws*, 147, § 1; 2 *Rev. Stat.* (1830), 52, § 1; 3 *Edw. Ch.* 380.)

The Constitution of 1846 (*Art. XIV*) transferred the jurisdiction of the Court of Chancery to the Supreme Court, over all matters which had formerly been cognizable by the former tribunal, and it is under this clause therefore that the above provision was enacted.

By *section* 263, § 8 of the New Code of Civil Procedure, the *civil* jurisdiction of each of the Superior City Courts extends, concurrently with that of the Supreme Court, to the custody of the person and the care of the property of idiots, lunatics and habitual drunkards, found incompetent to manage their affairs.

2. *Habitual Drunkards.* Under 2 R. S. 52, § 1, the power of the Chancellor was, by *chap.* 109 of the Laws of 1821, and *chap.* 135 of 1822, extended to the estates of habitual drunkards and persons of unsound mind, as in the cases of idiots and lunatics; and the court had, through the committee, per-

fect control over the person of an habitual drunkard, and the committee, subject to the court's control, might fix the place of his residence. (*Matter of Lynch*, 5 *Paige's Ch.* 120; *Matter of Janes*, 30 *How. Pr.* 446.) Under existing statutes, any justice of the Supreme Court or county judge of the county in which an inebriate resides may commit such inebriate to the State Inebriate Asylum, or the Inebriates' Home for Kings county in the manner provided by law for a term not exceeding one year. (2 *R. S.*, Part 1, *Ch. XX*, Tit. 4, § 48, 53, 6th *Edn.*) The Constitution of 1846, has transferred the same power which the Chancellor formerly possessed over habitual drunkards, to the Supreme Court and County Courts. (See *chapter on Habitual Drunkards*.)

§ 2. In every commission of lunacy, appointed to inquire into the mental sanity of any party, the inquiry or issue shall be confined to the question, whether or not the person who is the subject of the inquiry is at the time of such inquiry of unsound mind¹ and incompetent to manage himself or his affairs; and no evidence as to any thing said or done by such persons, or as to his demeanor or state of mind at any time being more than two years before the time of such commission or inquiry, shall be receivable in proof of insanity on any such inquiry, unless the court shall otherwise direct.

1. It is not sufficient, upon a commission of lunacy, for the jury to find that the individual proceeded against is incapable of managing his affairs, or governing himself, in consequence of mental imbecility or weakness. To authorize the court to appoint a committee, upon the presumption that his mind is so far impaired as to reduce it to the standard of idiocy, the jury must find distinctly that he is of unsound mind and mentally incapable of governing himself, or managing his affairs. (*Matter of Morgan*, 7 *Paige*, 236, 1838.) In the *matter of Mason* (1 *Barb. S. C.* 44, *A. D.* 1847) HARRIS, J., said that "the form of the return to the inquisition is only important so far as it is necessary to satisfy the conscience of the court. If, upon the coming in of the inquisition, enough appears to enable the court to adjudge the party to be within some one of the classes of

persons over whom the statute has given it jurisdiction, it is sufficient. Nevertheless it seemed better to adhere to the technical form of the finding in the language of the statute." This is in substantial agreement with that tendency to enlarge the jurisdiction of courts of equity over the feeble minded, which began in Lord HARDWICKE's day and was so emphatically indorsed by his successors ELDON and ERSKINE, and in our State by KENT and WALWORTH. (*Ex parte Cranmer*, 12 *Vesey*, 445; 19 *Ib.* 286; *Ex parte Barnsley*, 3 *Atk.* 168; *Ex parte Read*, 1 *Ib.* 160; *Ex parte Harvey*, 3 *Ib.* 169; *Ex parte Ashton*, *Ib.* 169; *Matter of Barker*, 2 *Johns. Ch.* 233; 3 *Edw. Ch.* 380.) And the reason is obviously, because of the well-known rule of law, that, where a jury state their premises and draw a conclusion which does not necessarily follow from such premises, the conclusion is not to be taken by itself. They should accordingly find some cause which in its very nature is the *efficient* one of such a result as their conclusion establishes. Collateral or ambiguous causes will not answer. Hence, the term "unsoundness of mind" has been always considered as expressing a generic basis for whatever form of mental incompetency the evidence might reveal. It is doubtful therefore whether any thing is gained by departing from those time-honored metewands of the law within which, if a party be not found either a lunatic or an idiot, his legal incapacity must be shown to rest upon unsoundness of mind. The reason also of the inquiry, usual at all times, as to when the lunacy began, is this, that when it appears that the lunacy is of some duration and that the lunatic has performed any legal acts, the principle upon which the law extends its protection requires that an examination should be instituted into the circumstances of competency or incompetency, under which those acts were performed. (*Ex parte Smith*, 1 *Swanst.* 3; *Ex parte Hall*, 7 *Ves.* 263.)

§ 3. Every committee or guardian of the estate of any idiot, lunatic, or other person of unsound mind, as hereinbefore specified, shall, within six months after their appointment, file in the office of the clerk of the court which appointed such committee or guardian, a just and true inventory of the whole real and personal estate of such idiot, lunatic or other person, stating the income and profits thereof, and the debts, credits and effects, so far as the same shall have come to the knowledge of such committee or guardian. He shall also file in the office of the clerk of the court aforesaid, a semi-annual account, thereafter under oath, and of the disposition made of the income of such estate; and whenever any property belonging to such estate shall be discovered after the filing of any inventory, it shall be the duty of such committee or guardian to file as aforesaid, a just and true account of the same, from time to time, as the same shall be discovered.

§ 4. Such inventories shall be verified by the oath of the committee or guardian, to be taken before a judge of any court of record. And the filing of such inventories may be compelled by the order and process usual in such cases of the court which appointed the committee or guardian.

§ 5. Receivers and committees of lunatics and habitual drunkards, appointed by any order or decree of any court of competent jurisdiction, may sue in their own names for any debt, claim or demand transferred to them, or to the possession and control of which they are entitled as such receiver or committee; and when ordered or authorized to sell such demands, the purchaser thereof may sue and recover therefor in his own name, but shall give such security for costs to the defendant as the court in which such suit is brought may direct.¹

1. Previous to the enactment of chap. 112, Laws of 1845, and of § 113 of the old Code of Procedure, no action for money had and received to the use of a lunatic, nor actions on promissory notes, could be brought in the name of the committee. They may now be brought in his name without describing his official status toward the lunatic. (*Davis v. Carpenter*, 12 *How. Pr.* 287; *Code*, § 449.)

§ 6. Any idiot, lunatic or person of unsound mind, seized of any real estate, or of any interest in any real estate, or entitled to dower therein, or to any term for years in lands, may, by committee duly appointed, apply to the Supreme Court or County Court for the sale or disposition of the same in the manner hereinafter directed.¹

1. The statute of 17th Edw. 2, ch. 10, did not authorize the sale or alienation of the lands or tenements of a lunatic, but simply provided for their safe-keeping. The powers of the Court of Chancery included nothing beyond care and supervision of such estates until restoration to reason of their owners. Hence, in *Ex parte Dikes* (8 *Vesey*, 79),

Lord ELDON said that there should be an act of Parliament to cure this incapacity of the court, since it could not give an absolute title to a lunatic's leasehold estate. The common law of England having been adopted as far as practicable in this State, the above rule was formerly in force here. (*Gorham v. Gorham*, 3 *Barb. Ch.* 24.) In consequence of which, previous to the passage of chap. 417 of the Laws of 1864, chap. 627 of the Laws of 1869, and chap. 37 of the Laws of 1870, no actions relating to the real estate of a lunatic could be brought in the name of his committee. (*Lane v. Schemerhorn*, 1 *Hill*, 97; *McKillip v. McKillip*, 8 *Barb.* 552.) The rule was the same in law and equity, and the reason assigned was, that the committee had no estate in the realty of the lunatic, being a mere bailiff acting under the direction of the court. (*Petrie v. Shoemaker*, 24 *Wend.* 85; *Jackson v. King*, 4 *Cowen*, 207; *Odell v. Buck*, 21 *Wend.* 142; *Shelford on Lunatics*, 179; 1 *Collinsen*, 270.) Under the statute and new Code of Civil Procedure, § 449, he is now created the trustee of an express trust with all the powers appertaining thereto. (*Person v. Warren*, 14 *Barb.* 488.) Nevertheless, no estate or interest, legal or equitable, vests in him, nor does the lunatic lose his rights of property or action, being still owner of the fee.

§ 7. On such application said committee shall give a bond to such idiot, lunatic or person of unsound mind, in addition to the bond given on appointment as such committee, to be filed with the clerk of said court, in such penalty, with such sureties and in such form as the court shall direct, conditioned for the faithful performance of the trust reposed, for the paying over, investing and accounting for all moneys that shall be received by such committee, according to the order of any court having authority to give directions in the premises, and for the observance of the orders and directions of the court in relation to the trust.

§ 8. Upon the filing of such bond the court may proceed in a summary manner by reference to a referee, to inquire into the merits of such application, and if such bond be forfeited, the court shall direct it to be prosecuted for the benefit of the party injured.

§ 9. Whenever it shall appear satisfactorily that a disposition of any part of the real estate of such idiot, lunatic or person of unsound mind, or of any interest in any term for years, is necessary and proper

either for the support and maintenance of such idiot, lunatic or person of unsound mind, or for his or her education, or that the interest of such idiot, lunatic or person of unsound mind requires, or will be substantially promoted by such disposition, on account of any part of such property being exposed to waste and dilapidation, or on account of its being wholly unproductive, or when the same has been contracted to be sold and a conveyance thereof cannot be made by reason of such lunacy or unsoundness of mind, or for any other peculiar reason or circumstances, the court may order the letting for a term of years or the sale or other disposition of such real estate or interest to be made by such committee or guardian in such manner and with such restrictions as shall be deemed expedient, or may order the fulfillment of said contract by conveyance by such committee or guardian according to the terms of the contract.¹

1. Previous to the enactment of the above provisions the Supreme and other courts, as the successors of the Court of Chancery, had no authority to order the sale of the real estate of a lunatic, unless necessary for the payment of his debts, or the maintenance of the lunatic or his family, or for the education of his children. And in neither case could this be done if there was personal estate sufficient for that purpose. (*Matter of Petit*, 2 *Paige's Ch.* 596.)

§ 10. But no real estate, or term for years, or any interest in real estate hereinbefore named, shall be sold, leased or disposed of in any manner against the provisions of any last will, or of any conveyance by which such estate or term or interest was devised or granted to such idiot, lunatic or person of unsound mind.

§ 11. Upon an agreement for the sale, leasing or other disposition of such property being made, or upon any conveyance in fulfillment of a contract being executed in pursuance of such order, the same shall be reported to the court on the oath of the committee making or executing the same, and except in the case of a conveyance to fill a contract, if the report be confirmed, a conveyance shall be executed under the directions of the court.

§ 12. All sales, leases, dispositions and conveyances made in good faith by such committee in pursuance of such orders shall be as valid and effectual as if made by such lunatic when of sound mind.

As the committee of the estate of a lunatic has no interest in his estate, being considered as a mere bailiff, such committee cannot, on his own authority, grant any leases of the lunatic's estate. (*Foster v. Marchant*, 1 *Vern.* 262; *Knipe v. Palmer*, 2 *Wils.* 130; *Shelford*, p. 438.)

Formerly such a lease in England, made even by the order of the Court of Chancery, was not valid at law, because

the King could not grant it. Lord ELDON, in *Ex parte Dikes* (8 *Vesey*, 79), held that he could make a lease of the lunatic's estate only during the lunacy, and that a tenant trusting to the order of the court and taking a lease might be ejected by the lunatic if he recovered. Before the enactment of similar provisions in our statutes (1 *R. L.* 147, § 3), the court could grant no orders for making other than temporary leases covering the actual period of the lunacy.

§ 13. The court shall make order for the application and disposition of the proceeds of such property, and for the investment of the surplus belonging to such idiot, lunatic or person of unsound mind, and shall ascertain the value of any dower or right of dower, or inchoate right of dower, and shall direct a return of such investment and disposition to be made on oath as soon as may be, and shall require accounts to be rendered periodically by any committee or other person who may be intrusted with the disposition of the income of such proceeds.

§ 14. No sale made, as aforesaid, of the real estate or interest therein of any idiot, lunatic or person of unsound mind, shall give to such persons aforesaid any other or greater interest or estate in the proceeds of such sale than such idiot, lunatic or person of unsound mind had in the estate so sold; but the said proceeds shall be deemed real estate of the same nature as the property sold, or the interest therein of the said idiot, lunatic or person of unsound mind, and the court shall make order for the preservation of the same.

§ 15. If the real estate of any idiot, lunatic or person of unsound mind, or any part of it, shall be subject to dower or other life estate, and the person entitled thereto shall consent in writing to accept a gross sum in lieu of such dower or other life estate or the permanent investment of a reasonable sum, in such manner as that the interest thereof be made payable to the person entitled to such dower or life estate during life, the court may direct the payment of such sum in gross or the investment of such sum as shall be deemed reasonable, and shall be acceptable to the person entitled to the said dower or other life estate or right therein, actual or contingent, in manner aforesaid.

§ 16. Before any such sum shall be paid or such investment made, the court shall be satisfied that an effectual release of such right of dower or other life estate, actual or contingent, has been executed.

§ 17. Whenever the personal estate of any such idiot, lunatic or person of unsound mind, shall not be sufficient for the discharge of his debts, it shall be the duty of the committee of his estate to apply by petition to the court by which they were appointed for authority to mortgage, lease or sell so much of the real estate of such idiot, lunatic or person of unsound mind, as shall be necessary for the payment of such debts. The said petition shall set forth the particulars and amount of the estate, real and personal, of such idiot, lunatic or person of unsound mind, the application which may have been made of any personal estate, and an account of the debts and demands existing against such estate.¹

1. The committee, under the statute, has power to employ the personal estate of the lunatic in payment of debts, without order from the court, because such committee has the legal title to the personal estate, on the same principle that testamentary guardians are held to have legal title to the personal estate of their wards. So long, therefore, as the personal estate of the lunatic is sufficient to pay his debts, the committee may employ the same without order from the court. (*Pickersgill v. Read*, 5 *Hun*, 170.)

The court, however, is not authorized to order a sale of the real estate of a lunatic or of an habitual drunkard, except where a sale is necessary for the support of himself or of his family, or for the payment of his debts. But if necessary for the reformation of an habitual drunkard, the court will direct him to be confined in a lunatic asylum, and may order his real estate to be sold to pay the expenses of his support there. (*Matter of Hoag*, 7 *Paige*, 312.) A court, however, may order an equitable partition of the estate of a lunatic or habitual drunkard in extinction of a claim for damages against him. (*Matter of Heller*, 3 *Paige*, 199.) And where all the estate of a lunatic has been expended in his maintenance, on petition of the committee the court may, upon the report of the master (or referee), order the lunatic delivered over to the overseers of the poor. (*Matter of McFarlan*, 2 *Johns. Ch.* 440.)

In the management of the estate of a lunatic, his interest, rather than the contingent one of others, is to be considered; hence real estate may be converted into personal, and personal into real, if necessary. (*Matter of Salisbury*, 3 *Johns. Ch.* 347. See also *Procedure*, "Duties of Committee.")

§ 18. On the presenting of such petition it shall be referred to a referee, or to the clerk of the court, to inquire into and report upon the matters therein contained; whose duty it shall be to examine into the truth of the representations made, to hear all parties interested in such real estate, and to report thereon with all convenient speed.

§ 19. If, upon the coming in of the report and an examination of the matter, it shall appear to the court that the personal estate of the idiot, lunatic or person of unsound mind, is not sufficient for the payment of his debts, and that the same has been applied to that purpose,

as far as the circumstances of the case rendered proper, an order shall be entered directing the mortgage, leasing or sale of the whole or such part of the said real estate as may be necessary to discharge the said debts.

§ 20. The court may require any additional security to be given by such committee as may seem necessary to secure a more faithful application of, and accounting for the proceeds of such mortgage, lease or sale, and shall require an account thereof to be rendered from time to time.

§ 21. In the application of any moneys raised by any such mortgage, lease or sale, the committee shall pay all debts in an equal proportion, without giving any preference to such as have a legal priority.¹

1. The above acts relating to the sale of a lunatic's real estate, being in derogation of the common law, must be construed strictly. No mandatory provision can be modified, the court being without discretionary power in the premises. Every requirement, therefore, is substantial and must be obeyed. (*Matter of Valentine*, N. Y. Ct. App., Jan., 1878, 3 Abb. N. C. 285; *Battel v. Torrey*, 65 N. Y. 294.) As to the right of a legislature to authorize the guardian of an infant or lunatic to sell his real estate, a right which has been questioned in some States, see *Cooley on Const. Lim.* 103, and *ca. ci.* in favor of the doctrine, and *Sedgwick on Stat. and Const. Law*, 148, against. *Et adhuc sub judice lis est.*

§ 22. The court shall give such orders respecting the time and manner of any sale herein authorized, as shall be deemed proper; and no conveyance in pursuance of any such sale shall be executed until the sale shall have been reported on the oath of the committee, and confirmed by the court directing the same.

§ 23. Whenever any idiot, lunatic or person of unsound mind shall be seized or possessed of any real estate by way of mortgage, or as a trustee for others in any manner, his committee may apply to the Supreme Court or to the County Court for authority to convey and assure such real estate to any other person or persons entitled to such conveyance or assurance, in such manner as the said court shall direct, upon which a reference and the like proceedings shall be had, as in the case of an application to sell real estate as aforesaid, and the court, upon hearing all parties interested, may order such conveyance or assurance to be made.

§ 24. On the application of any person entitled to such conveyance or assurance by action or petition, the committee may be compelled by the Supreme Court or County Court, on a hearing of all parties interested, to execute such conveyance or assurance.

§ 25. Every conveyance, mortgage, lease and assurance made under the order of the Supreme Court, or of any court, pursuant to the pro-

visions of this act, shall be as valid and effectual as if the same had been executed by such idiot, lunatic or person of unsound mind when of sound memory and understanding.

§ 26. The Supreme Court shall have authority to decree and compel the specific performance of any bargain, contract or agreement which may have been made by any lunatic or person of unsound mind while such person aforesaid was of sound memory and understanding, and to direct the committee of such person to do and execute all necessary conveyances and acts for that purpose.¹

1. By chap. 30 of the Laws of 1801, the Chancellor had the power to decree and compel a specific performance of any bargain, contract or agreement, which may have been made by any lunatic while in sound mind, to the like effect as if he had continued sane, and to direct the committee of the estate of such lunatic to do and execute all necessary acts for that purpose. (1 *R. L.* 148, § 5; 2 *R. S.* 55, §§ 20, 22.) This is in affirmance of the practice of the English Chancery, which not only sustains contracts executed while the lunatic was sane, but will, under some circumstances, even enforce those which are still executory at the commencement of the insanity. And the ground there taken is that a change in the mental condition of one contracting party does not alter the relative rights of the parties, if such rights can be enforced. Hence, where the legal estate is vested in trustees, the court will decree a specific performance, although before the passage of the statutes 11 Geo. 4, and 1 Wm. 4, ch. 65, 427, if the legal estate was vested in the lunatic himself, the court could afford no adequate relief. In cases of contracts to sell, mortgage, let, divide or exchange lands, the practice then was to decree that the lunatic should execute a conveyance when he recovered his understanding, and that, in the meantime, the other party should hold and enjoy the land. (*Owen v. Davies*, 1 *Ves. Sr.* 82; *Hall v. Warren*, 9 *Ves.* 605; *Pegg v. Skinner*, 1 *Cox's C. C.* 23; *Shelford*, 565.)

All these contingencies have been provided for under our own statutes, since 1801, so that they are now mostly of historical rather than of practical value. And this principle of the power of a court of equity to decree

specific performance has been applied beyond even the original point of lunacy in a contracting party, and so as to include his heirs. Thus, it has been held that where a party makes a contract for the sale of land, and dies before the same is carried into effect, leaving an only child as his heir at law, who is a lunatic, a court of equity has power to decree a specific performance of the contract, and to direct the committee of the lunatic to execute the necessary conveyances for that purpose. But neither the lunatic nor his estate can be charged with the costs of the suit. (*Swartwout v. Burr*, 1 Barb. S. C. 498.)

§ 27. The real estate of any idiot, lunatic, or person of unsound mind, shall not be leased for more than five years, or mortgaged or aliened or disposed of otherwise than is hereinbefore directed.

§ 28. In case any lunatic or person of unsound mind shall be restored to his right mind and become capable of conducting his own affairs, his real and personal estate shall be restored to him.

§ 29. In case of the death of any idiot, lunatic or person of unsound mind, or person incapable of conducting his own affairs during such state of incapacity, the power of any committee appointed under this act shall cease, and the real estate of such idiot, lunatic or person of unsound mind, or person incapable of conducting his own affairs, shall descend to his heirs, and his personal estate be distributed according to law, in the same way as if he had been of sound mind and memory, and capable of conducting his own affairs.¹ But nothing herein contained shall be held to affect the provisions of any last will and testament duly made, and which shall be duly admitted to probate.

1. It will be remembered that in the statute of 17th Edw. 2nd, ch. 11 and 12, the King was required on the death of any idiot, of whose lands he held the custody, to restore the same to his rightful heirs; whereas in the case of lunatics, the residue, upon the death of the *non compos*, was to be distributed for his soul by the advice of the ordinary. (*Hist. of Lunacy Legislation*, p. 4.) Are we to infer from the above discrimination in the law of descents that lunatics were supposed to have souls worth saving, while idiots had not? The advice of the ordinary was in the nature of a claim for his ecclesiastical heriot, or soul scot. (2 Bl. Com. 425.) Singularly enough this last clause of the statute of Edward was altered on the change of religion by the 32 Hen. 8, ch. 46, which gave the fund to the

executors of the lunatic. But this amendment was repealed by 12 Chas. 2, ch. 24, which thus revived the old statute until it was gradually swept away in the amendments of the law of administration.

TITLE THIRD.

OF THE STATE LUNATIC ASYLUM AT UTICA.

SECTION 1. There is established at the city of Utica, the State Lunatic Asylum under the control of nine managers who shall hold their offices for three years, and until others are appointed in their stead, subject to being removed at any time by the Senate, upon the recommendation of the Governor. Their successors shall be appointed by the Senate upon the nomination of the Governor, and shall hold their offices for three years and until others are appointed in their stead, and subject to be removed in the manner aforesaid. The government of the State Lunatic Asylum shall be vested in the said board of managers, a majority of whom shall reside within five miles of said asylum.

This institution, the first State Hospital Asylum for the Insane, organized by legislative enactment in New York, was constructed under various statutes. (See *Hist. of Lunacy Legislation*; also *Twenty-fifth Annual Report of the Managers of the State Lunatic Asylum at Utica, for 1867, pp. 42-59.*) It was finally organized under the provisions of chap. 135, Laws of 1842, and was opened for the reception of patients on the 16th of January, 1843. The above act was intended to create a system of proper legal supervision of the *persons* of lunatics, to be co-ordinated to the existing supervision of the Court of Chancery. It introduced an entirely new system of administration of the powers of superintendents of the poor, county judges, and others having legal relations to the insane, there being at the time of its passage no other acts *in pari materia*. (*Supervisors of Onondaga v. Morgan*, 4 Abb. Court App. R. 335.) Previous to this, the Society of the New York Hospital had furnished since 1797, the only proper accommodations for lunatics in the State, insomuch

that by chap. 90 of the Laws of 1809, authority was given the overseers of the poor to contract with the governors of this institution for the care and maintenance of the pauper insane.

§ 2. Said board shall have the general direction and control of all the property and concerns of the institution not otherwise provided for by law, and shall take charge of its general interests, and see that its great design be carried into effect, and every thing done faithfully according to the requirements of the Legislature, and the by-laws, rules and regulations of the asylum.

§ 3. The managers shall appoint a superintendent, who shall be a well-educated physician of experience in the treatment of the insane, and a treasurer, who shall give bonds for the faithful performance of his trust, in such sum and with such sureties as the Comptroller of the State shall approve. They shall also appoint, upon the nomination of the superintendent, a steward, four assistant physicians and a matron, all of whom, and the superintendent himself, shall constantly reside in the asylum, and shall be designated the resident officers thereof.

§ 4. The managers of said asylum shall have the power, on the nomination of the superintendent of said asylum, to appoint a special pathologist¹ to said asylum, whose salary shall be determined and paid in the same manner as provided by law in relation to the other officers of said asylum.

1. Insanity has always been treated by modern physicians as a disease whose physical basis rested upon alterations in the nutrition of the brain, terminating in structural changes; and the same opinion, to the extent of a layman's appreciation, is expressed by Lord HARDWICKE in *Ex parte Barnsley* (3 *Atkyns*, 174, A. D., 1744), where he says, that "Lunatick is a technical term coined in more ignorant times as imagining these persons were affected by the moon, but discovered by philosophy and ingenious men, that it is entirely owing to a *defect of the organs of the body*." Notwithstanding this admission of a physical basis for possible evidence of its existence, through varying stages of brain degeneration, no steps had been taken by the State, previous to the creation of a special pathologist, to make systematic researches into the etiology or causation of such structural changes, with reference to tracing either their origin, their relations, both local or remote, their consequences as measured by symptoms, or their connection, as far as that might

be traced, with certain mental phenomena observed during life. The object of such a department is one of inquiry only, and taken in connection with similar researches now going on in Europe, gives promise of throwing light in a direction hitherto unexplored, by furnishing indications for a more rational diagnosis of brain diseases and a better means of interpreting their various stages of progression. It thus enables physicians to pronounce more correct opinions upon questions of civil or criminal responsibility, involving power of self-control, presence of convulsing lesions, and similar recondite points in the law of mental action and moral liberty, and thus, also supplies them with better data for prognosticating the mental future of an insane person.

§ 5. The managers shall, from time to time, determine the annual salaries and allowances of the treasurer and resident officers of the asylum, who have been or may hereafter be appointed, subject to the approval of the Governor, Secretary of State and the Comptroller, provided that such salaries do not exceed in the aggregate fifteen thousand dollars for one year.

§ 6. The salaries of the treasurer and resident officers of the asylum shall be paid quarterly, on the first days of January, April, July and October in each year, by the Treasurer of the State, on the warrant of the Comptroller, out of any moneys in the treasury not otherwise appropriated, to the treasurer of the asylum, on his presenting a bill of particulars, signed by the steward and certified by the superintendent.

§ 7. The managers may take and hold in trust for the State any grant or devise of land, or any donation or bequest of money or other personal property, to be applied to the maintenance of insane persons and the general use of the State Lunatic Asylum.

§ 8. The superintendent, treasurer and steward of the asylum, before entering upon their respective duties, shall severally take the oath prescribed in the first section of the twelfth article of the Constitution of the State ; and such oath shall be filed with the clerk of the county of Oneida.

§ 9. The managers are hereby directed and empowered to establish such by-laws as they may deem necessary and expedient for regulating the appointment and duties of officers, attendants and assistants, for fixing the conditions of admission, support and discharge of patients, and for conducting in a proper manner the business of the institution ; also to ordain and enforce a suitable system of rules and regulations for the internal government, discipline and management of the asylum.

§ 10. The superintendent shall be the chief executive officer of the asylum. He shall have the general superintendence of the buildings, grounds and farm, together with their furniture, fixtures and stock ;

and the direction and control of all persons therein, subject to the laws and regulations established by the managers. He shall daily ascertain the condition of all the patients and prescribe their treatment in the manner directed in the by-laws. He shall have the nomination of his co-resident officers, with power to assign them their respective duties, subject to the by-laws; also to appoint, with the managers' approval, such, and so many other officers, assistants and attendants as he may think proper and necessary for the economical and efficient performance of the business of the asylum, and to prescribe their several duties and places, and to fix, with the managers' approval, their compensation, and to discharge any of them at his sole direction; but in every case of discharge he shall forthwith record the same, with the reasons, under an appropriate head in one of the books of the asylum. He shall also have power to suspend until the next meeting of the managers, for good and sufficient cause, a resident officer; but in such case he shall forthwith give written notice of the fact, with its causes and circumstances, to one of the managers, whose duty thereupon shall be to call a special meeting of the board to provide for the exigency. He shall also, from time to time, give such orders and instructions as he may judge best calculated to insure good conduct, fidelity and economy in every department of labor and expense; and he is authorized and enjoined to maintain salutary discipline among all who are employed by the institution, and to enforce strict compliance with such instructions, and uniform obedience to all the rules and regulations of the asylum. He shall further cause full and fair accounts and records of all his doings, and of the entire business and operations of the institution, to be kept regularly from day to day, in books provided for that purpose, in the manner and to the extent prescribed in the by-laws; and he shall see that all such accounts and records are fully made up to the last day of November in each year, and that the principal facts and results, with his report thereon, be presented to the managers within thirty days thereafter. The first assistant physician shall perform the duties and be subject to the responsibilities of the superintendent in his sickness or absence.

§ 11. The resident officers of the State Lunatic Asylum, and all attendants and assistants actually employed therein during the time of such employment, shall be exempt from serving on juries, from all assessments for labor on the highways, and in time of peace, from all service in the militia; and the certificate of the superintendent shall be evidence of the fact of such employment.

§ 12. The managers shall keep in a bound book to be provided for that purpose, a fair and full record of their doings, which shall be open at all times to the inspection of the Governor of the State, and of all persons whom he or either house of the Legislature may appoint to examine the same.

§ 13. The managers shall maintain an effective inspection of the asylum, for which purpose they shall make frequent visitations, a majority of them once every quarter, and the whole board once a year, at the times and in the manner prescribed in the by-laws. In a book kept by the managers for this purpose, the visiting manager or managers shall note the date of each visit, the condition of the house, patients, with remarks of commendation or censure, and all the man-

agers present shall sign the same. The general results of the inspections, with suitable hints, shall be inserted in the annual report, detailing the past year's operations and actual state of the asylum, which the managers shall make to the Legislature in the month of January in each year, accompanied with the annual reports of the superintendent and treasurer.

§ 14. It shall be the duty of the resident officers to admit any of the managers into every part of the asylum, and to exhibit to him or them, on demand, all the books, papers, accounts and writings belonging to the institution, or pertaining to its business, management, discipline or government; also to furnish copies, abstracts and reports whenever required by the managers.

§ 15. The treasurer shall have the custody of all moneys, bonds, notes, mortgages and other securities and obligations belonging to the asylum. He shall open with one of the banks in Utica, to be selected with the approbation of the Comptroller of the State, an account in his own name, as treasurer of the asylum; and he shall deposit all moneys, immediately upon receiving them, in said bank, and shall draw for the same only for the uses of the asylum and in the manner prescribed in the by-laws, upon the written order of the steward, specifying the object of the payment. He shall keep full and accurate accounts of receipts and payments in the manner directed in the by-laws, and such other accounts as the managers shall prescribe. He shall balance all the accounts on his books annually, on the last day of November, and make a statement of the balances thereon, and an abstract of the receipts and payments of the past year; which he shall within three days deliver to the auditing committee of the managers, who shall compare the same with his books and vouchers, and verify the results by further comparison with the books of the steward, and certify the correctness thereof within the next five days to the managers. He shall further render a quarterly statement of his receipts and payments on the first day of March, June and September in each year to the auditing committee, who shall compare and verify the same as aforesaid, and report the results, duly certified, to the managers, who shall cause the same to be recorded in one of the books of the asylum. He shall further render an account of the state of his books, and of the funds and other property in his custody, whenever required so to do by the managers.

§ 16. The treasurer of the State Lunatic Asylum shall be vested with the same powers, rights and authority which are now by law given either to superintendents of the poor or to overseers of the poor in any county or town of the State, so far as may be necessary for the indemnity and benefit of the asylum, and for the purpose of compelling a relative or committee to defray the expenses of a lunatic's support in the asylum, and reimburse actual disbursements for his necessary clothing and traveling expenses, according to the by-laws of the institution; also for the purpose of coercing the payment of similar charges when due according to said by-laws, from any town, or city, or county that is liable for the support of any lunatic in said asylum.

§ 17. Said treasurer is also authorized to recover for the use of the asylum, any and all sums which may be due upon any note or bond in his hands belonging to the asylum; also any and all sums which

may be charged and due according to the by-laws of the asylum, for the support of any patient therein, or for actual disbursements made in his behalf for necessary clothing and traveling expenses, in an action to be brought in said treasurer's name, as treasurer of the State lunatic asylum, and which shall not abate, by his death or removal, against the individual town, city or county legally liable for the maintenance of said patient, and having neglected to pay the same when demanded by the treasurer; and judgment shall be rendered for such sum as shall be found due, with interest from the time of the demand made as aforesaid. Said treasurer may also, upon the receipt of the money due upon any mortgage in his hands belonging to the asylum, execute a release and acknowledge full satisfaction thereof, so that the same may be discharged of record.

§ 18. The steward, under the direction of the superintendent, shall make all purchases for the asylum, and preserve the original bills and receipts thereof, and keep full and accurate accounts of the same, and copies of all orders drawn by himself upon the treasurer; he shall also, under like direction, make contracts in the superintendent's name with the attendants and assistants, and keep and settle their accounts; he shall also keep the accounts for the support of patients and expenses incurred in their behalf, and furnish the treasurer every month with copies of such as fall due; he shall make quarterly abstracts of all accounts to the last day of every February, May, August and November, for the treasurer and managers; he shall also be accountable for the careful keeping and economical use of all furniture, stores and other articles provided for the asylum.

§ 19. As soon as the asylum shall be ready for the admission of patients, the managers shall cause notice thereof to be published for two weeks in the State paper and sent to the clerk of every county, who shall transmit copies thereof to the superintendents of the poor of said county by mail. A circular from the superintendent shall accompany said notice to each county clerk and to the superintendents of the poor, designating different days for the counties severally to send to the asylum their respective quotas of patients, and giving all necessary directions respecting admission and support according to the by-laws.¹

1. This was originally intended only as a *temporary* section to last until the completion of the asylum. It is now obsolete.

§ 20. The superintendent shall make, in a book kept for the purpose, at the time of reception, a minute, with date, of the name, residence, office and occupation of the person by whom and by whose authority each insane person is brought to the asylum, and have all the orders, warrants, requests, certificates, and other papers accompanying him, forthwith copied into the same.¹

1. See § 4, Tit. 1, Art. 1.

§ 21. No patient shall be admitted into the asylum for a shorter period than six months, except in special cases, as specified in the by-laws.

§ 22. Whenever there are vacancies in the asylum, the managers may authorize the superintendent to admit, under special agreements, such recent cases as may seek admission under peculiarly afflictive circumstances, or which, in his opinion, promise speedy recovery.¹

1. While it is unquestionably the intention of the law organizing public hospitals, that their advantages should be restricted to the poor and needy, there would seem to be no good reason why tax payers who contribute toward their support, should be excluded from them absolutely. In cases of lunacy this would be particularly unjust, since the paucity of private hospitals dedicated to its treatment gives little opportunity to the self-supporting patient to obtain the care which his condition may require. The private asylums in the State of New York would not contain one-half of the self-supporting insane who need hospital treatment. Whenever, therefore, there is room in a public or State asylum, the managers have the authority, as above given, under the definition of "asylum," in section 37, to receive private patients, since it might be impossible for the relatives of a lunatic (who by law are required to confine and to maintain him), to either do so at home or in a private asylum. In the one case they might not have a suitable place; in the other they might not have adequate means.

The self-supporting insane have, therefore, a right to be treated in them, nor, if citizens of this State, can they legally be refused admission. The law, however, contemplates that numerical preference shall be given to the insane poor, and for this purpose recites that the self-supporting must be recent cases, when admitted, and must appear to "promise speedy recovery," so that an accumulation of chronic cases of that class may not occur to the burthening of the institution, and the exclusion of the curable pauper insane. This provision applies with equal force to all State asylums, except that for insane criminals, and the Willard, at which latter only chronic cases can be received.

§ 23. All town and county officers sending a patient to the asylum shall, before sending him, see that he is in a state of perfect bodily cleanliness, and is comfortably clothed and provided with suitable changes of raiment, as prescribed in the by-laws.

§ 24. The managers, upon the superintendent's certificate of complete recovery, may discharge any patient, except one under a criminal charge or liable to be remanded to prison ; and they may discharge any patient admitted as " dangerous," or any patient sent to the asylum by the superintendent or overseers of the poor, or by the (first) judge of a county, upon the superintendent's certificate that he or she is harmless, and will probably continue so, and not likely to be improved by the further treatment in the asylum, or when the asylum is full, upon a like certificate that he or she is manifestly incurable, and can probably be rendered comfortable at the poor-house ; so that the preference may be given, in the admission of patients, to recent cases, or cases of insanity of not over one year's duration.¹ They may discharge and deliver any patient, except one under criminal charge as aforesaid, to his relatives or friends, who will undertake with good and approved sureties for his peaceable behavior, safe custody and comfortable maintenance, without further public charge.² And the bond of such sureties shall be approved by the county judge of the county from which said patient was sent, and filed in the county clerk's office of said county. Upon the presentation of a certified copy thereof, the managers may discharge such patient.

1. The rule for discharging patients (not criminals) from *State asylums* is fully set forth here. It will be perceived that certain conditions must pre-exist and be complied with. Neither superintendents of the poor, nor even relatives, can remove a county patient at will, but in every case it is for the managers to determine under which of the conditions recited in the statute the patient can be discharged. It is otherwise with mere transfers from one State asylum to another, for all these asylums, except the one for insane criminals, being under a similar administrative code to that at Utica, the powers of their managers are, in respect to the subject of discharges, alike. A patient transferred from one asylum to another is not thereby *discharged*, but simply removed from the custody of one board of managers to that of another, he all the while remaining in the custody of the State, whose bailiffs they are for the purposes declared in the statute creating their office.

A patient confined in any of the asylums in this State, unless otherwise provided for by statute and some special

place of confinement designated, may be transferred by competent authority to another asylum, without new medical certificate, provided always,

1st. That he was legally committed at the outset.

2d. That less than ten days have elapsed since such transfer; and —

3d. That his mental condition remains the same.

A harmless or non-dangerous lunatic is not deemed at law a proper subject for confinement in an asylum. The legal test is that of impending harm to himself or to others. In the absence of these proofs, he is to be treated as an infant simply needing guardianship. Whenever, therefore, a lunatic, though uncured, becomes harmless, it is proper that he should be discharged from an asylum, provided he can be placed under suitable guardianship. This the above section was intended to secure. (*Comm. ex rel. Stewart v. Kirkbride*, 2 *Brewster*, 419.)

2. But the mere fact of consanguinity or friendship gives no claim *per se* to the right of guardianship, unless accompanied by means of suitable maintenance. (See § 6, *Tit. 1, Art. 1*.)

§ 25. A patient of the criminal class may be discharged by order of one of the justices of the Supreme Court, or a Circuit judge, if, upon due investigation, it shall appear safe, legal and right to make such order.¹

1. In order to discharge a person under indictment, who has subsequently become insane and remains so permanently, it is first necessary for the district attorney of the county where such indictment was found to obtain leave to enter a *nol. pros*, after which the party being purged of all imputation of crime passes into the category of an ordinary lunatic, and may thereupon be discharged in the manner recited in section 24. The form of procedure in other cases is set forth in section 33 of Article Second of Title first.

§ 26. No patient shall be discharged without suitable clothing; and, if it cannot be otherwise obtained, the steward shall, upon the order

of two managers, furnish it, also money not exceeding twenty dollars, to defray his necessary expenses until he reaches his friends, or can find a chance to earn his subsistence.

§ 27. The managers of the State Lunatic Asylum shall receive no compensation for their services, but shall receive their actual and reasonable traveling and other expenses, to be paid on the warrant of the Comptroller on the rendering of their accounts.

§ 28. All purchases for the use of the asylum shall be made for cash, and not on credit or time; every voucher shall be taken, duly filled up at the time it is taken; with every abstract of vouchers for money paid shall be proof on oath that the voucher was filled up and the money paid therefor at the time the voucher was taken; and the managers shall make all needful rules and regulations to enforce the provisions of this section.

§ 29. The price to be paid for keeping the poor or any person in indigent circumstances, in the asylum, shall be annually fixed by the managers, and shall not exceed the actual cost of support and attendance, exclusive of officers' salaries. The managers may, at their discretion, require payments made quarterly or semi-annually in advance.

§ 30. Every insane person supported in the asylum shall be personally liable for his maintenance therein, and for all necessary expenses incurred by the institution in his behalf. And the committee, relative, town, city or county, that would have been bound by law to provide for and support him if he had not been sent to the asylum, shall be liable to pay the expense of his clothing and maintenance in the asylum, and actual and necessary expenses to and from the same.¹

1. At common law the estate of a lunatic is liable for the price of necessaries suited to his social position and enjoyed by and *bona fide* supplied to him. (*Broom's Comm. on Comm. Law*, p. 604; *Baxter v. Portsmouth*, 5 B & C. 170; *Nelson v. Duncombe*, 9 Beav. 211; *Shafer v. Wing*, 2 Hun, 617; *Barnes v. Hathaway*, 66 Barb. 452.)

§ 31. The expenses of clothing and maintaining in the asylum a patient who has been received upon the order of any court or officer, shall be paid by the county from which he was sent to the asylum. The treasurer of said county is authorized and directed to pay to the treasurer of the asylum the bills for such clothing and maintenance as they shall become due and payable according to the by-laws of the asylum, upon the order of the steward; and the supervisors of said county shall annually levy and raise the amount of such bills, and such further sum as will probably cover all similar bills for one year in advance. Said county, however, shall have the right to require any individual, town, city or county, that is legally liable for the support of such patient, to reimburse the amount of said bills with interest from the day of paying the same.

§ 32. Whenever the managers shall order a patient removed from the asylum to the poor-house of the county whence he came, the superintendents of the poor of said county shall audit and pay the actual and reasonable expenses of such removal as part of the contin-

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gent expenses of said poor-house. But, if any town or person be legally liable for the support of such patient, the amount of such expenses may be recovered for the use of the county by such superintendents. If such superintendents of the poor neglect or refuse to pay such expenses on demand, the treasurer of the asylum may pay the same and charge the amount to the said county; and the treasurer of the said county is authorized to pay the same, with interest, after thirty days; and the supervisors of the said county shall levy and raise the amount as other county charges.

§ 33. Every town or county paying for the support of a lunatic in the asylum, or for his expenses in going to or from the same, shall have the like rights and remedies to recover the amount of such payments, with interest from the time of paying each bill, as if such expenses had been incurred for the support of the same at other places under existing laws.¹

1. *Pomeroy v. Wells*, 8 *Paige*, 406.

§ 34. None of the provisions of this act shall restrain or abridge the power and authority of the Supreme Court of the State over the persons and property of the insane.¹

1. The equitable powers of the Supreme Court, where the jurisdiction belonging to the Chancellor at the time this statute was passed (*chap.* 135 of 1842) now resides and is vested, might, in a proper case, be invoked by petition. These powers are expressly reserved by section 40 of that act. This should be done also by petition, and not by writ of *habeas corpus*. (*Ex parte Burns*, *Sup. Ct. Chambers*, 1st *Dept.*, July, 1872.)

§ 35. The managers of the said asylum are authorized, under the direction and subject at all times to the control of the acting Canal Commissioner having charge of the Chenango canal, to use the surplus water discharged around or through the fifth lock on said canal, to operate a pump to supply said asylum with water from said canal or from Nail creek, in case the said Commissioner shall be of opinion that the same can be done without detriment to the navigation of said canal.

§ 36. The managers of the said asylum shall have control of the water in the levels of the Chenango canal, from the fifth to the tenth locks of said canal, both inclusive, and of the water discharged from said levels and locks, for the purpose of supplying said asylum with water and ice; and it shall be the duty of all officers having charge of said canal, and of the persons employed by them, to do all things necessary, and which may be required by said managers, for the supply of said asylum with water and ice as aforesaid; provided always that the said managers in all their acts in reference to said levels, and locks, and water, shall be at all times subject to the direction and control of the acting Commissioner having charge of said canal; and that

nothing shall be done or permitted by said managers which shall obstruct or interfere with the navigation of said canal, or which shall not first receive the sanction of the Commissioner in charge; and all persons, except such as are in the employ of the State, and such as are engaged in the navigation of the canal, are hereby prohibited from preventing, obstructing or in any way interfering with the said levels, locks and water of the canal, so as to prevent the free and full use thereof by the said asylum, and from doing any thing to injure the quality of said water for said use; and any person who shall in any way willfully violate this prohibition shall be guilty of a misdemeanor.

§ 37. The terms "lunacy," "lunatic" and "insane," as used in this act, shall include every species of insanity and extend to every deranged person, and to all of unsound mind other than idiots.¹ The word "oath" includes "affirmation," the word "overseer" means "overseer of the poor," and "county superintendent" means "superintendent of the poor;" the word "asylum" and "institution" means "any State lunatic asylum;" a word denoting the singular number is to include one or many; and every word importing the masculine gender only may extend to and include females.

1. In the ordinary import of language, the terms "lunacy," "lunatic" and "insane" may be accepted as now synonymous, and descriptive of an identical condition. But to extend them to every deranged person cannot be defended upon either physiological or pathological grounds. A person intoxicated by alcohol, opium, or hasheesh may be deranged so far as loss of mental poise testifies, but this is not insanity, any more than occasional depression is melancholia. Derangement of mind may be only a functional symptom of disturbed circulation, while insanity implies an established condition resting upon a neurotic diathesis. Insanity, therefore, has a foundation apart from any exciting causes, while derangement needs only the latter.

TITLE FOURTH.

THE WILLARD ASYLUM FOR THE INSANE.¹

SECTION 1. There is established in the town of Ovid and county of Seneca, the Willard Asylum for the Insane, under the control of eight trustees. The term of office of said trustees is eight years. The said trustees and their successors shall be appointed by the Governor, by and with the consent of the Senate.

1. This asylum, dedicated to the exclusive use of the chronic insane, was organized in 1865 as the result of information obtained under authority of the Legislature, pursuant to chap. 418 of the Laws of 1864. Its organic law, designated as chap. 342 of the Laws of 1865, recites that it is "An Act to authorize the establishment of a State asylum for the chronic insane, and for the better care of the insane poor, to be known as the Willard Asylum for the Insane," and its chief object was to secure the removal of the insane poor from the county poor-houses, where they were simply herded, and to provide them with the medical care and domestic treatment required by their condition. (See *Report on the condition of the Insane Poor in the County Poor-houses of New York*, by Sylvester D. Willard, M. D., Jan'y 13, 1865; *Assembly Document No. 19.*) The institution received its first patients on the 13th of October, 1869.

It will be perceived by the title of the organic act of this asylum, which defines the intent of its purpose, that the words used are terms of limitation. No recent cases of insanity, meaning cases of less than one year's duration, can, therefore, be committed to its custody. But there is nothing in this act which forbids the trustees from receiving private patients as at any other State asylum, *provided* only that they belong to the chronic class. For the first clause of the title of this act defines it to be "an act to authorize the establishment of a State asylum for the chronic insane" generally, and the second clause, reciting that it is "for the better care of the insane poor," while it describes one class of the chronic insane, namely, the poor, is not followed by any provision in the law itself, restricting the use of the asylum to them exclusively. And inasmuch as in the second section, its trustees are given all the rights, privileges and powers which are possessed by the managers of the State Lunatic Asylum at Utica, and these latter are empowered to receive "such recent cases as may

seek admission under peculiarly afflictive circumstances," by parity of reason, both these organic acts being *in pari materia*, there seems no ground for doubting that the trustees of the Willard Asylum may, whenever there are vacancies in that institution, receive private patients of the chronic class.

§ 2. Said trustees shall have all the rights, privileges and powers, and be subject to the same duties, in said asylum, as are now possessed by and imposed upon the board of managers of the State Lunatic Asylum at Utica, and shall be subject to removal at any time by the Senate upon recommendation of the Governor. Said trustees shall also fix the rate per week, not exceeding the actual cost of support and attendance, exclusive of officers' salaries, for the board of patients. It shall further be the duty of said trustees, as portions of said asylum are completed and ready for the reception of the insane, to designate, in a just and equitable manner, and with the approval of the Governor, the counties from which the chronic pauper insane shall be sent to said asylum, as parts of the room shall be ready, from time to time, for the reception of patients, except as hereinafter provided.

1. This section and sections 2, 3, 4, 5, 7, 9, 12, 13 and 24 of Title Third are also acts *in pari materia*, and should be construed according to the intention of the Legislature, since a thing within the intention is within the statute, though not within the letter; and a thing within the letter is not within the statute, unless within the intention. (*People v. Utica Ins. Co.*, 15 *Johns. S. C.* 358; *Jackson v. Collins*, 3 *Cowen*, 89; *Dresser v. Brooks*, 3 *Barb.* 429.) So far as any legal distinctions exist, discriminating between recent and chronic cases of insanity, Titles Third and Fourth must be interpreted under these limitations, whenever a disregard of them would manifestly be a violation of the intention of the organic act. But in non-essential things a liberal construction is to be given to the powers conferred upon managers, whenever such use of them is plainly beneficial to the insane. The intention of the Legislature was to assimilate, as far as possible, the government of all later asylums to that in force at Utica.

§ 3. The managers shall appoint a medical superintendent who shall be a well-educated physician of experience in the treatment of the insane, and a treasurer, who shall give bonds for the faithful performance of his trust, in such sum and with such sureties as the

Comptroller shall approve. They shall also appoint, in their discretion, and upon the nomination of the medical superintendent, a steward and matron, and five assistant physicians, all of whom and the medical superintendent shall constantly reside in the asylum, or on the premises, and such other officers and assistants as may now be allowed by law. They shall also, from time to time, with the approval of the Governor, Comptroller, and Secretary of State, determine the annual salary and allowances of the before named officials, the aggregate amount of such salaries not to exceed the sum of eleven thousand eight hundred and fifty dollars in any year. (*Ch. 86, Laws of 1878.*)

§ 4. The superintendent, resident officers and treasurer shall be subject to the same duties, and shall have the same rights and powers as are possessed by, and imposed upon, the superintendent, resident officers and treasurer of the State Lunatic Asylum at Utica.

1. This is in keeping with and a corollary to section second.

§ 5. All town and county officers sending a patient to the asylum shall, before sending him, see that he is in a state of perfect bodily cleanliness, and is comfortably clothed, and provided with suitable changes of raiment as prescribed in the by-laws. (*Same as § 23, Tit. 3d.*)

§ 6. The expenses of clothing and maintaining, in the asylum, a patient who has been received upon the order of any court, or officer, shall be paid by the county from which he was sent to the asylum, The treasurer of said county is authorized and directed to pay to the treasurer of the asylum the bills for such clothing and maintenance, as they shall become due and payable, according to the by-laws of the asylum, upon the order of the steward; and the supervisors of said county shall, annually, levy and raise the amount of such bills, and such further sums as will probably cover all similar bills for one year in advance. Said county, however, shall have the right to require any individual, town, city or county that is legally liable for the support of such patient, to re-imburse the amount of said bills, with interest from the day of paying the same.¹ (*Same as § 31, Tit. 3.*)

1. This is in affirmance of section 13 of Tit. 1, Art. 1. But as no officer is here specified to whom authority is given to bring suit, that power undoubtedly inheres in the board of supervisors.

§ 7. Every town or county paying for the support of a lunatic in the asylum, or his expenses in going to or from the same, shall have the like rights and remedies to recover the amount of such payments, with interest from the time of paying each bill, as if such expenses had been incurred for the support of the same, at other places, under existing laws. (*Same as § 34, Tit. 3d.*)

§ 8. The managers shall receive no compensation for their services, but shall receive their actual and reasonable traveling and other expenses, to be paid on the warrant of the Comptroller, on rendering their accounts. (*Same as § 27, Tit. 3d.*)

§ 9. In all purchases for the use of the asylum every voucher shall

be taken, duly filled up, at the time it is taken, with every abstract of vouchers for money paid, and shall be proof on oath that the voucher was filled up and the money paid therefor at the time the voucher was taken; and the managers shall make all needful rules and regulations to enforce the provisions of this section.

§ 10. The chronic pauper insane from the poor-houses of the counties shall be sent to the said asylum by the county superintendents of the poor, except from those counties having asylums for the insane, to which they are now authorized to send such insane patients by special legislative enactments, or such counties as have been, or may hereafter be exempted by the State Board of Charities. And all the chronic insane pauper patients who may be discharged not recovered from State lunatic asylums, and who continue a public charge, shall be sent to the asylum for the insane hereby created; and all such patients shall be a charge upon the respective counties from which they are sent.¹

•1. This is the pivotal section of the whole act, and secures the removal of the chronic pauper insane from the poor-houses to this asylum as rapidly as they can be received. It also affords occasional exemptions, by way of exception to a law, which the capacities of the institution would not permit to be carried out to the letter, as rapidly as they might be called upon.

First, to those counties having authority by special legislative enactments to care for their own insane, whether recent cases or chronic, in asylums of their own, like the counties of New York, Kings and Monroe.

Second, to those counties which, having asylums suitable for the custody and comfortable maintenance of the *chronic* insane, when quiet and harmless, have, upon due inspection of such asylums and approbation of the same, been exempted by the State Board of Charities, upon conditions whose breach renders the exemption revocable at the pleasure of such Board. This exception is exclusively restricted to the *chronic* insane, and does not in any event authorize such counties to retain acute or recent cases in their asylums for more than ten days.

In the absence of legislative enactments granting special authority to treat the insane of every class, county asylums are not places to which cases of recent insanity can legally be committed. To retain such a lunatic in one is a misde-

meanor for which an indictment will lie. (See § 9, *Tit. 1, and explanatory section which follows.*)

TITLE FIFTH.

HUDSON RIVER STATE HOSPITAL FOR THE INSANE.

SECTION 1. There is established near the city of Poughkeepsie, the Hudson River State Hospital for the Insane, under the control of nine managers, who are appointed by the Senate upon the nomination of the Governor, and hold their offices for six years and until others are appointed in their stead, and subject to be removed at any time by the Senate upon the recommendation of the Governor, and a majority of the said managers shall reside within the county of Dutchess.

§ 2. The said managers have the rights and powers, and are subject to the same duties, as are now possessed by and imposed upon the managers of the State Lunatic Asylum at Utica; and the Hudson River State Hospital for the Insane is organized and governed under the laws organizing and governing the State asylum at Utica, except as may be herein otherwise provided.

§ 3. The managers shall appoint a medical superintendent, who shall be a well-educated physician of experience in the treatment of the insane, and a treasurer, who shall reside in the city of Poughkeepsie, and give bonds for the faithful performance of his trust in such sum and with such sureties as the Comptroller of the State shall approve. They shall also appoint, at their discretion, and upon the nomination of the medical superintendent, a steward and a matron, and such assistant physicians as the necessity of the hospital shall from time to time require, all of whom and the medical superintendent shall constantly reside in the hospital or on the premises, and shall be designated as the "resident officers."

§ 4. The managers shall, from time to time, with the approval of the Governor, Comptroller and Secretary of State, determine the annual salaries and allowances to the treasurer and resident officers, the aggregate amount of the said salaries not to exceed the sum of twelve thousand dollars for any one year.

§ 5. As soon as portions of the hospital shall be prepared for the reception of patients, the managers shall cause notice thereof to be published in the State paper and sent to the county clerk, county judge and superintendents of the poor of each of the following counties: Clinton, Essex, Franklin, Warren, Washington, Saratoga, Albany, Rensselaer, Greene, Columbia, Ulster, Dutchess, Orange, Sullivan, Putnam, Rockland, Westchester, New York, Kings, Queens, Suffolk and Richmond. A circular from the medical superintendent shall accompany said notice to each county clerk, county judge and superintendent of the poor, designating the number and class of patients to be received; and when the hospital shall be completed, due notice shall be given as above, so that all patients who may then

be in the State Lunatic Asylum at Utica, chargeable to the above-mentioned counties, shall be transferred to the Hudson River State Hospital for the Insane.

This section has been repealed as stated below.

§ 3. Sections 4 and 5 of chap. 337 of the Laws of 1870, limiting the hospital district from which patients may be received at the Hudson River State Hospital for the Insane at Poughkeepsie, are hereby repealed. (See *Chap. 264, Laws of 1875*, § 3.)

§ 6. The counties enumerated in the last section shall constitute the Hudson River State Hospital district, and the hospital shall be designated the Hudson River State Hospital. (*Amended as above.*)

§ 7. The managers and other officers shall have no interest, direct or indirect, in the furnishing of any building materials, or in any contracts for the same, or in any contracts for labor in the erection of said hospital.

§ 8. It shall be the duty of the managers to make a detailed report of all the moneys received by them, and of the progress which shall have been made in the erection of said buildings, to the Legislature in January of each year, and also to the Comptroller, as often and in such manner as the Comptroller shall or may, from time to time, require.

§ 9. The plans and specifications for said hospital shall be upon the basis of accommodating not exceeding five hundred patients at any one time, and shall be approved by the Governor, Comptroller and Secretary of State.

TITLE SIXTH.

THE BUFFALO STATE ASYLUM FOR THE INSANE.

SECTION 1. There is established, in the city of Buffalo, The Buffalo State Asylum for the Insane, under the control of ten managers appointed by the Governor, by and with the consent of the Senate.

§ 2. They shall be subject to be removed at any time by the Senate, upon the recommendation of the Governor. Their successors shall be appointed by the Governor, and shall hold their office for six years, and until others are appointed in their stead, and subject to be removed in the manner aforesaid; and, in case of a vacancy in said board, the Governor shall appoint, in manner aforesaid, to fill the unexpired term.

§ 3. The said managers have all the rights and powers and are subject to the same duties, as are now possessed by and imposed upon the managers of the State Lunatic Asylum at Utica; and the Buffalo State Asylum for the Insane shall be organized and governed under

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the laws organizing and governing the State asylum at Utica, except as may be herein otherwise provided.

§ 4. The managers shall appoint a medical superintendent, who shall be a well-educated physician of experience in the treatment of the insane, and a treasurer, who shall reside in the city of Buffalo, and give bonds for the faithful performance of his trust, in such sum and with such sureties as the Comptroller of the State shall approve. They shall also appoint, at their discretion and upon the nomination of the medical superintendent, a steward and a matron, and one or more assistant physicians, as the necessities of the hospital shall from time to time require, all of whom, and the medical superintendent, shall constantly reside in the hospital, or on the premises, and shall be designated the resident officers.

§ 5. The managers shall, from time to time, determine the annual salaries and allowances of the treasurer and resident officers, subject to the approval of the Governor of the State, Secretary of State and the Comptroller; provided that such salaries shall not exceed, in the aggregate, ten thousand dollars for any one year.

§ 6. The managers shall procure plans, drawings and specifications for the construction of the hospital and other buildings, and the improvement of the grounds, and shall contract for the erection of the buildings in accordance with such plans and specifications, and on such terms as they may deem proper; provided such plans, drawings, specifications, contracts, and the terms thereof, shall be approved by the Governor, State Engineer and Comptroller; and further provided, that the managers shall not adopt any plans for the hospital or other buildings, nor alter or change the plans adopted, without the assent of the State officers aforesaid.

§ 7. The managers and other officers shall have no interest, direct or indirect, in the furnishing of any building materials, or in any contracts for the same, or in any contracts for labor in the erection of said hospital.

§ 8. It shall be the duty of the managers to make a detailed report of all the moneys received by them, and the progress which shall have been made in the erection of said buildings, to the Legislature in January of each year, and also to the Comptroller, as often and in such manner as the Comptroller shall or may from time to time require.

§ 9. The plans and specifications for said hospital shall be upon the basis of accommodating not exceeding five hundred patients at any one time.

TITLE SEVENTH.

THE STATE HOMŒOPATHIC ASYLUM FOR THE INSANE AT MIDDLETOWN.

SECTION 1. There is established at Middletown, in the county of Orange, a State lunatic asylum for the care and treatment of the insane upon the principles of medicine known as the homœopathic; by the name of "The State Homœopathic Asylum for the Insane, at Middletown," under the control of twenty-one trustees appointed by the

Governor, by and with the consent of the Senate, and who shall be adherents of homœopathy. The trustees shall be subject to removal for cause by the Senate, upon the recommendation of the Governor. The term of office of said trustees is seven years.

§ 2. The said trustees shall not, for their own private advantage or gain, directly or indirectly, deal or trade in buying or selling any goods, wares, merchandise or other property whatsoever, belonging to, or to be used for, the said corporation.

§ 3. The financial and other business concerns of said asylum are under the direction of said board of trustees, who shall elect from their number at each annual meeting, a president, a vice-president, a secretary and a treasurer, who shall hold their offices for one year, or until their successors shall be elected. Seven of said trustees shall constitute a quorum for the transaction of business, and a majority of the number present at a meeting shall be requisite to make any order in the management of the asylum. All other duties, rights and powers of said trustees shall be the same as those imposed upon the managers of the State Lunatic Asylum at Utica.

§ 4. Any trustee failing to attend the regular meetings of the board for one year may thereupon, at the option of said board, be deemed to have vacated his office, and a successor may be appointed to fill the same.

§ 5. The trustees shall hold their annual meeting on the third Thursday in June, at the asylum, to receive reports of their officers as to the business and affairs of said corporation, and to transact such other business as may be deemed necessary.

§ 6. The board of trustees of said asylum shall have power to make, constitute, ordain and establish, from time to time, such by-laws, rules and regulations as they shall deem proper for transacting, managing and directing the affairs of said asylum; provided, that such by-laws, rules and regulations do not conflict with this act, or with the Constitution and laws of this State or of the United States.

§ 7. The board of trustees may appoint a superintending homœopathic physician and assistant physicians, and such other officers and agents of the said corporation as they shall deem necessary, who shall respectively hold and perform the duties pertaining to their offices and agencies during the pleasure of said board, and the said board shall, from time to time, fix the salaries of such superintending physicians, assistant physicians, officers and agents. But the annual salaries of the superintendent, assistant physicians, treasurer, steward and matron shall be approved by the Governor, Secretary of State and Comptroller; provided that such salaries shall not exceed in the aggregate eight thousand dollars for any one year.

§ 8. The charges to be made by the said asylum for the care and treatment of patients shall be such sum only as shall, in the aggregate, be sufficient to defray the current expenses of said asylum.

§ 9. The expenditure of all money appropriated by the State for the erection of said asylum, together with all amounts derived or received from other sources, shall be fully and duly accounted for to the Comptroller.

§ 10. The treasurer of said asylum shall give bonds for the faithful performance of his trust in such sum and with such sureties as the Comptroller of the State shall approve.

§ 11. County judges and superintendents of the poor in any of the counties of this State, and all county or other officers having authority to commit insane persons to any of the State lunatic asylums in this State, are hereby authorized to commit indigent and pauper insane persons, for whom homœopathic treatment may be desired, to the State Homœopathic Asylum for the Insane at Middletown, in the same manner and on the same terms and conditions as are now required or may hereafter be required by law, for the commitment of indigent or pauper insane persons to any of the other State lunatic asylums in this State, provided the number, in the aggregate, of such patients shall not exceed the accommodations at the disposal of the superintendent in said asylum.¹ (*Amendment pursuant to chap. 414, Laws of 1874, § 1.*)

1. The above section is simply declaratory of a pre-existing power, inasmuch as it authorizes that to be done specially which before could be done generally. Ever since the enactment of chap. 135 of the Laws of 1842 it has always been in the power of county judges and superintendents of the poor, where no exceptional provision forbade it (as in the case of the Willard Asylum), to send recent cases of insanity to any State asylum, and this has been done in the history of each subsequent new asylum without a fresh recital of such authority, because the power was inherent in such officers and the statutes *in pari materia*. But it will hardly be contended, as a matter of right, that any pauper or indigent can compel the county to support him exclusively in an institution of his own selection. It must always remain discretionary, therefore, under the present statute, with county judges and superintendents of the poor, whether they will acquiesce or not in the request of any pauper or indigent for whom homœopathic treatment is desired, and send him to this asylum. The language of the statute is certainly not imperative, but only permissive.

Nor does this statute designate the person or persons from whom the request for homœopathic treatment shall emanate. It will be conceded at the outset that a lunatic can have no legal capacity to choose the *locus in quo* of his medical treatment, any more than of his domicile, since he is not a person *sui juris*, and if he be an indigent or a pauper, without any committee of the person and estate to choose for him, then the superintendents of the poor, being *virtute*

officii his committee, are, together with the county judge, the only persons who can legally choose the place for his treatment. In whatever light we view the statute, we shall see that it cannot be construed into a defeasance of the original powers of county judges or superintendents of the poor, for these powers are, in relation to all paupers, alike inseparable from the civil disabilities under which such persons are placed, and in the case of the insane the necessity for guardianship and restraint requires that the power and place of exercising both should be left to those whom the law has invested with the authority of guardians. In case of the refusal, therefore, of a county judge or superintendent of the poor to send an indigent or pauper lunatic to the homœopathic asylum, we fail to see the power lodged anywhere to compel him. (*People v. Com'rs of Emigration*, 27 Barb. 562.)

TITLE EIGHTH.

THE STATE LUNATIC ASYLUM FOR INSANE CRIMINALS.

SECTION 1. The building erected at Auburn for an asylum shall be known and designated as the State Asylum for Insane Criminals, at Auburn.¹

1. This asylum was created by chap. 456 of the Laws of 1855, § 1, as a special department of our State prisons, in the terms following, viz.: "The Inspectors of the prisons of this State are hereby authorized and required without delay to make the necessary and suitable provisions in one of the State prisons of this State, and the removal to such place for safe-keeping and proper care of all the insane convicts now in the State Lunatic Asylum at Utica; and whenever the physician of a State prison shall duly report to the warden of such prison that any convict confined therein is so far insane as to render him dangerous, or an improper subject of prison discipline, it shall be the duty of said warden to remove such convict to the place so

provided; and the officers having charge of such place shall receive such convict and retain him there at the expense of the State, so long as he or she shall continue insane." Its act of organization was passed in 1858 as chapter 130 of the Laws of that year.

Since the amendment of Art. 5, § 4 of the Constitution, in 1876, abolishing the Board of Inspectors of State prisons, and substituting in lieu thereof one Superintendent, all the provisions of this Title referring to the powers or duties of such previous Board of Inspectors are to be read and interpreted as referring to the said Superintendent of State prisons, to whom is constitutionally transferred all the powers and attributes, and who is consequently clothed with all the authority heretofore belonging to his predecessors in office.

§ 2. The State Commissioner in Lunacy¹ shall appoint a medical superintendent for said asylum, who shall be a well-educated physician of experience in the treatment of the insane, who shall, under the direction of said inspectors, have charge of said asylum, and shall make all purchases for the support of the said asylum, and shall account for all moneys coming to his hand in the same manner as the agent and warden of any of the State prisons are now required by law to do.

1. This clause giving the appointing power of a medical superintendent to the Commissioner in Lunacy, is in manifest conflict with Art. 5, § 4, of the Constitution of 1846, as amended by vote of the people Nov. 7, 1876, wherein it is recited that the Superintendent of State prisons "shall appoint the agents, wardens, physicians, and chaplains of the prisons." The State Commissioner in Lunacy being only a statutory officer, no such power can be granted him, and the above clause is consequently invalid.

§ 3. The said medical superintendent shall reside in the building, and shall devote as much of his time as may be necessary to the care and treatment of those confined therein. He shall receive a salary of two thousand dollars* per annum, payable monthly, and shall be allowed rations for himself and family, and all necessary fuel and lights for warming and lighting his rooms in said building.

*Chap. 312 of the Laws of 1877, § 1, amending chap. 446 of 1874.

§ 4. The superintendent shall be the chief executive officer of the asylum. He shall have the general superintendence of the buildings and grounds, together with their furniture, fixtures and stock; and the direction and control of all persons therein, subject to such laws and regulations as may be established by the board of inspectors. He shall have the nomination of his co-resident officers, with power to assign them their respective duties, subject to the by-laws aforesaid. Also to appoint, with the approval of the board, such and so many attendants and employees as he may think proper and necessary for the economical and efficient administration of the affairs of the asylum, and to prescribe their several duties and places, and to discharge any of them at his sole discretion. But in every case of discharge so occurring, he shall forthwith enter the same, with the reasons therefor, under an appropriate head, in one of the record books of the asylum. He shall also have power to suspend, until the next meeting of the board, for good and sufficient cause, any resident officer; but in such case he shall forthwith give written notice of the fact, with its causes and circumstances, to said board, whose duty thereupon it shall be to call a special meeting of the board to provide for the exigency. The assistant physician shall perform the duties and be subject to the responsibilities of the superintendent, in his sickness or absence.

§ 5. The other officers and employees in said asylum shall be an assistant physician, who shall also perform the duties of clerk of said asylum; a matron, and not exceeding ten male attendants for the male department, and four female attendants for the female department, who shall be appointed by the Board of Prison Inspectors, upon the recommendation of the medical superintendent; and the monthly wages of such attendants shall be fixed from time to time by the said Board of Prison Inspectors, not to exceed twenty-five dollars per month each, and the same paid monthly, and said attendants shall reside in, and be boarded at the expense of, such asylum.

§ 6. The Inspector of State prisons shall cause any female convict in the State prison at Sing Sing, who now is or hereafter may become insane, to be removed to and retained in the female department of the State Asylum for Insane Criminals in the manner provided by law. And all the provisions of this act shall apply to the cases of convicts so removed, except that whenever any such female convict shall have become restored to reason, she shall be transferred to and again received into the female State prison at Sing Sing.

§ 7. The medical superintendent shall file in the office of the Comptroller of this State a bond in the penal sum of ten thousand dollars, conditioned for the faithful performance of his duty as such, which bond, before it shall be filed, shall be approved by the Board of Inspectors; and no medical superintendent shall enter upon the discharge of the duties of said office till such bond so approved shall have been duly filed, as aforesaid.

§ 8. The superintendent shall estimate monthly, as is now provided by law, and subject to the same restrictions and conditions as in the case of agents and wardens of the State prisons, for all moneys necessary for the support and maintenance of said asylum, which estimate shall be submitted to and carefully examined by the inspector in

charge of the said Auburn prison, who, if he is satisfied that the said estimate is correct, and that the articles named in said estimate are actually needed for the support and maintenance of said asylum, shall certify the same, and on the production of said estimate, so certified, to the Comptroller, he shall draw his warrant on the Treasurer for the amount of said estimate, and the Treasurer shall pay the amount of said warrant out of any money in the treasury appropriated for the support of the State prisons.

§ 9. The Inspectors of State Prisons shall adopt such rules and regulations from time to time, as they shall deem proper for the control and management of the said asylum, which said rules and regulations shall be approved by the State Commissioner in Lunacy, and they shall also have power to remove any and all the officers in said asylum for cause, and shall enter such cause in full on the minutes of their proceedings at the asylum. And no officer removed by the said Inspectors, for cause, shall be re-appointed to any position in said asylum.

§ 10. Whenever the physicians of either of the State prisons of this State shall certify to the Board of Inspectors, or to the Inspector in charge, that any convict therein is insane it shall be the duty of such Board or of such Inspector in charge, to make immediately, a full examination into the condition of such convict, and if satisfied that he is insane, the said Board of Inspectors, or the Inspector in charge, shall order the agent or warden of the prison where such convict is confined forthwith to convey said convict to the State Asylum for Insane Criminals, and to deliver him to the superintendent thereof, who is hereby required to receive him into the said asylum, and retain him there until legally discharged.

§ 11. Whenever any convict in the State Asylum for Insane Criminals, under and by virtue of the provisions of this act, shall continue to be insane at the expiration of the term for which he was sentenced,¹ the Board of Inspectors, upon the superintendent's certificate that he is harmless, and will probably continue so, and that he is not likely to be improved by further treatment in the asylum; or upon a like certificate that he is manifestly incurable, and can probably be rendered comfortable at the county alms-house, may cause such insane convict to be removed at the expense of the State from said asylum, to the county wherein he was convicted, or to the county of his former residence, and delivered to and placed under the care of the superintendents of the poor of such county, and the said superintendents are hereby required to receive such insane convict under their charge; they may also discharge and deliver any convict whose sentence has expired, and who is still insane, to his relatives or friends, who will undertake with good sureties to be approved by said superintendent of the State Asylum for Insane Criminals, for his peaceful behavior, safe custody and comfortable maintenance without further public charge.

§ 12. In case the insanity of any convict shall continue after the expiration of his sentence, he shall be retained in said asylum until adjudged a fit subject to be discharged by the State Commissioner in Lunacy.²

1. The *expiration* of the term of sentence is regulated here as in other State prisons by the amount of commuta-

tion earned by the convict under chap. 417, Laws of 1862; and its amendments, chap. 415, Laws of 1863, chap. 321, Laws of 1864, and chap. 451, Laws of 1874.

2. This clause was super-added in order that the State might be judicially represented, as the guardian of all its insane, in a proceeding intended to determine whether its custody of an insane person once a convict, can cease with safety to the community.

§ 13. Whenever any convict, who shall have been confined in the said asylum as a lunatic, shall have become restored to reason, and the medical superintendent of said asylum shall so certify in writing, he shall be forthwith transferred to the Auburn State prison, and the agent and warden of said prison shall receive said convict into the said prison, and shall, in all respects, treat such convict as if he had been originally sentenced to imprisonment in said prison, though said convict may have been conveyed to the said asylum from either of the other prisons of the State; but any convict received from a penitentiary shall be returned to the same.

§ 14. Whenever the Inspectors of State prisons shall order any convict to be transferred to the asylum for insane criminals, the agent and warden of the prison from which such convict is transferred shall cause a correct copy of the original certificate of conviction of said convict to be filed in his office, and shall deliver the original certificate to the superintendent of the asylum; and when any such convict shall be transferred to the Auburn prison from such asylum, as hereinbefore provided, the said superintendent shall deliver to the agent and warden of said prison such original certificate, which shall be filed in the clerk's office in said prison.

§ 15. The physician who shall attend any meeting of the Board of Inspectors of State prisons, or who shall make any examination of any convict, as hereinbefore provided, shall be paid his actual and reasonable traveling expenses in going to and returning from such examination or meeting, on the certificate of the president of the Board of Inspectors of State prisons that he has attended such meeting or examination.

§ 16. The superintendent is hereby authorized to recover for the support of any patient therein chargeable under the law to either counties or penitentiaries, in an action to be brought in said superintendent's name, as superintendent of the State Lunatic Asylum for Insane Criminals, and which shall not abate by reason of his death or removal, against the county or penitentiary for the maintenance of the said patient; and judgment shall be rendered for such sum as shall be found due, with interest from the time of the demand made.

TITLE NINTH.

LICENSES FOR PRIVATE ASYLUMS.¹

SECTION 1. No person or association shall establish or keep an asylum, institution, house or retreat for the care, custody or treatment of the insane, or persons of unsound mind, for compensation or hire, without first obtaining a license therefor from the State Commissioner in Lunacy; provided that this section shall not apply to any State asylum or institution, or any asylum or institution established or conducted by any county; and provided, also, that it shall not apply to cases where an insane person or person of unsound mind is detained and treated at his own house or that of some relative.

§ 2. Every application for such license shall be accompanied by a plan of the premises proposed to be occupied, describing the capacities of the buildings for the uses intended, the extent and location of grounds appurtenant thereto, and the number of patients of either sex proposed to be received therein; and it shall not be lawful for said Commissioner to grant any such license without having first visited the premises proposed to be licensed, and being satisfied by such examination that they are as described, and are otherwise fit and suitable for the purposes for which they are designed to be used.¹

1. We have seen under § 1 of Title 1, note 2d, that the law does not prohibit the confinement of a lunatic either in his own house or that of a relative, the claims of natural affection being respected and giving a preferred right of custody to that extent, even apart from the statutory duty imposed upon the relatives of a lunatic to confine and maintain him according as they have the means. But at the same time the constitutional sanctity of a private house against unwarrantable search cannot be extended to the degree of allowing its keeper to convert it at will, and for his individual profit, into a common asylum for lunatics; for, while such persons may, for the public safety, be confined according to the necessities of their condition, yet the State, being the legal guardian of all citizens under civil disability, has, as part of its prerogative, the right to decide *where and in what manner* such confinement shall be carried into effect. Under the claims of natural affection it permits lunatics to be restrained at home, or, if more desirable, in the house of a relative. But when any lunatic is found in the house of a stranger, with no other motive for his detention and care therein than the compensation and

hire thus earned, the law, looking upon such a consideration in the light of a purely commercial contract, demands guaranties of good faith in the custodian as a condition precedent to the discharge of his duties, and in addition exercises its visitatorial powers to see that no advantage is taken of the weaker party.

Therefore no person or association can, in this State, take lunatics as boarders for compensation or hire in his or their house, without a license previously obtained for that purpose; and the license is as necessary for the custody and care of one lunatic as it is for twenty. The reason is obvious. The motive being a purely commercial one, the relations between the custodian and his lunatic wards become a just cause for legal supervision. Whatever may be the equities at the start, and however equal, it is always in the power of the custodian to bend them to his advantage in a conflict of interests between himself and one who has only a limited, if any power of judgment. Because no complaint of wrong is made, it does not follow that none exists. The law places infants and lunatics upon a similar footing in this respect. (*Dig.*, l. 47, *Tit. X*, *Sec. 1*, *Art. 1*, § 1.)

The contract is for services to be rendered *in personam* to one void of legal capacity to appreciate the changing advantages of the situation; and as it may be for the interests of the custodian to prolong it, without reference to the wishes of the lunatic or his best interests, it is eminently proper that the State should, through the exercise of its visitatorial powers, keep itself constantly informed of the manner in which the contract is carried out. For, it must be borne in mind that the termination of the contract lies mostly in the discretion of him whose pecuniary advantage it may be to extend its time. Inasmuch, also, as the larger the number of insane persons in the house the greater may be the income of the keeper thereof, the inducements to prolonged detention, or to collusive arrangements with committees or relatives of lunatics, may thus be created by

circumstances which do not belong to the administration of public or State asylums, and which are further interrupted by the supervision of a board of managers whose duty it is to oversee every contract entered into by the superintendent for the care and maintenance of lunatics, and without whose assent no contract is valid.

While, therefore, private insane asylums meet a very necessary want of modern society, by providing for the self-supporting classes hospitals of a nearly domestic character, and where the paucity of patients enables the superintendent to give more time and personal attention to patients individually, it is very desirable in the interests of these patients, who would be otherwise without public supervision, that the State should keep itself advised of the place of their detention and of the manner in which the trust included in such detention is discharged.

Counties, on the other hand, being civil divisions of the State, can require no license to do that, which devolves upon them as the legal custodians of their own poor, whether insane or not. But they cannot retain, without legislative permission, cases of *acute* or recent insanity in asylums of their own, since, without this permission, no exception is made by the act of 1874 in behalf of any county whatever.

2. The granting of any license to a private asylum is discretionary with the State Commissioner in Lunacy. The statute does not in any event make it incumbent upon him to do so, but simply recites under what circumstances such license may not lawfully be granted. It would seem from this that although the premises might be fit and suitable for the purposes for which they are designed to be used, this alone would not entitle the petitioner to his license. For the character of the party himself, his professional qualifications, or his ability to provide suitable care and maintenance for his lunatic boarders, are elements of inquiry falling properly within the purview of the Commissioner's authority over the matter.

Nor, in refusing to grant such license, is it made his duty to state his reasons therefor. He violates no public duty in withholding it, since the statute gives him the discretionary power of a judicial officer in the premises. (*Vanderheyden v. Young*, 11 *Johns.* 150.) And whether a mandamus would lie to compel him to issue it is matter of grave doubt. For, it is a well-settled principle that wherever an official act requires the exercise of discretion, this remedy will not lie. (*People ex rel. Belden v. Contracting Board*, 27 *N. Y.* 378; *People ex rel. Duff v. Booth*, 49 *Barb.* 31; *People ex rel. Livingston v. Taylor*, 1 *Abb. Pr. N. S.* 200; 25 *Wend.* 680; 19 *Johns.* 259.)

In the absence of such a license no private asylum can receive lunatics without subjecting its keeper to the penalties of a misdemeanor, and to actions for false imprisonment at the hands of any who may have been thus unlawfully confined by him.

TITLE TENTH.

STATE COMMISSIONER IN LUNACY.

SECTION 1. The Governor shall nominate, and by and with the advice and consent of the Senate, appoint an experienced and competent physician, who shall be designated as the State Commissioner in Lunacy, who shall hold his office for five years, and receive an annual salary of four thousand dollars and traveling and other incidental expenses not to exceed one thousand dollars, and a sum not to exceed two hundred dollars to pay office rent and fuel, to be paid on presentation of vouchers to the Comptroller.

§ 2. It shall be the duty of such Commissioner to examine into and to report annually to the Legislature on or before the fifth day of January the condition of the insane and idiotic in this State, and the management and conduct of the asylums, public and private, and other institutions for their care and treatment.¹ And it shall be the duty of the officers and others respectively in charge thereof to give such Commissioner at all times free access, whether in person or by written communication, to the insane, and full information concerning them and their treatment therein.

VISITATION OF INSANE ASYLUMS.

Every insane asylum in the State of New York is now constituted by recent statutes an eleemosynary corporation of a public character, whether kept by one person, an association of self-incorporated persons, or a corporation representing the State. In the case of one person, or a self-incorporated association of persons, a license from the State is required. In the second instance, the State is itself both the founder and governor of the charity. (*Chap. 446, Laws of 1874, Tits. 1, 3, 5, 6, 7, 8, 9.*) All these institutions may now be visited, and their management judicially investigated by the Commissioner in Lunacy as delegate of the Legislature *quoad hoc*. The particular times when, or manner in which such visitations shall be made, are, in this amended provision, no longer designated, being deemed a limitation upon the supervisory authority of the State, thus exercising itself through the Commissioner.

The right of visitation of corporations by the State may be exercised in two ways. In the case of *civil* corporations, it is generally exercised through the medium alone of courts of justice and under common law process. (2 *Kent, p. 367.*)

But this can issue only upon complaint to the Supreme Court, which then acts from its general superintendent authority. The court, however, does not act in the light of a visitor any more than does the King's Bench in England; for as its judgments are liable to be reversed by writs of error, it wants one of the essential marks of visitatorial power. It is more proper to say, therefore, that civil corporations are not subject to visitation, but merely to the law of the land. (1 *Bl. Comm. 480.*)

In regard to eleemosynary corporations, which formerly were almost exclusively founded by private donation, the founder and his heirs were of common right the legal visitors. But the founder might appoint and assign any other person to be visitor, and such assignee was in-

vested with all the founder's power, in exclusion even of his heir. (1 *Broom & Hadley*, 410.) At common law, when no visitor is appointed, the visitation devolves upon the King, as in the strictest sense the founder of every corporation. (2 *Kyd on Corp.* 181 and 289; 4 *T. R.* 233; *Amherst Acad. v. Cows*, 6 *Pick. [Mass.]* 427.) By parity of reason, the same doctrine, *mutatis mutandis*, obtains in the United States. And in those cases where there is no individual founder or donor, the Legislature are the legal visitors of all corporations founded by them for public purposes. *Cujus est dare ejus est disponere*. The State may, therefore, in the case of a public charity, create boards of managers to superintend the same, and it may, in addition, appoint an independent officer or board of officers to visit all its public charities, delegating to such officers whatever powers it shall see fit. "Patronage and visitation," said Lord Holt, in *Phillips v. Bury* (2 *Term R.* 352), "are necessary consequents one upon another, and arise from the property which the founder has in the lands assigned to the charity." Whence it must follow that corporations, where the whole interests and franchises are the exclusive property and domain of the government itself, are always under the discretionary control of the Legislature. (*Dartmouth Coll. v. Woodward*, 4 *Wheaton*, 698; *Allen v. McKeen*, 1 *Sumner*, 298.)

§ 3. The said Commissioner shall have power to make and use an official seal, and all copies of papers and documents in his possession and custody may be authenticated in the usual form under his official seal and signature, and used as evidence in all courts and places in this State, in like manner as similar certificates emanating from any other public officer.

The official seal of the Commissioner is circular in form, the designation on the border reading as follows: "State Commissioner in Lunacy," N. York. The center has for device the scales of justice, beneath which is an open book representing the Revised Statutes, and under these is the legend in Latin, *Sub lege mederi et tutari*.

§ 4. The said Commissioner is hereby empowered to issue compulsory process for the attendance of witnesses and the production of papers, to administer oaths, and to examine persons under oath, and to exercise the same powers as belong to referees appointed by the Supreme Court, in all cases where, from evidence laid before him, there is reason to believe that any person is wrongfully deprived of his liberty, or is cruelly, negligently or improperly treated in any asylum, institution or establishment, public or private, for the custody of the insane ; or whenever there is inadequate provision made for their skillful medical care, proper supervision and safe-keeping ; and if the same shall be proved to his satisfaction, he is further empowered to issue an order in the name of the People of the State and under his official hand and seal, directed to the superintendent or managers of such institution, requiring them to modify such treatment or apply such remedy, or both, as shall therein be specified. And in case such order is disobeyed or negligently executed, the Commissioner may, and it shall be his duty to, present such order with a statement of the facts duly verified, upon which it was made, to a justice of the Supreme Court, who may thereupon by order require such superintendent or manager to show cause before such or some other justice of the Supreme Court at a place in the judicial district where such asylum, institution or establishment is situated, and at a time specified in such order not less than two days after the service thereof, why an order should not be made directing performance of such order of the Commissioner, and on failure to so show cause, the said justice shall make such order, and for any disobedience of any order made pursuant to the provisions of this section, the same proceedings may be taken to compel performance thereof, or to punish for contempt for such disobedience, as may be had for such purposes in civil actions.

The first duty of every visitor of a corporation, under whatever designation acting, is to judge according to and within the limitations of the statutes governing such corporation. (*Phillips v. Bury, Skinner*, 467 ; 1 *Ld. Raymond*, 5 ; 2 *Term R.* 335.)

The power of the visitor is confined solely to offenses against the laws prescribed for the government of the corporation, and he can officially take no cognizance of acts of disobedience to the general laws of the land. (2 *Kyd on Corp.* 276.)

The remedial authority of the Commissioner extends only over lunatics in asylums. Persons in the custody of committees and in private families, however maltreated, are not within his jurisdiction. Nor are lunatics who have

escaped from asylums and been abused during their capture and return thereto; or who are out on furloughs, for in all such cases the laws of the land provide adequate remedies.

Hence also the Commissioner cannot try the offender who may have committed a misdemeanor or tort against the person of a lunatic, for the reason that he has no criminal jurisdiction. He can only inquire whether such wrong has occurred and its recurrence is still impending as part of a system of erroneous administration of the asylum. But he cannot, when the fact of wrong is even established, attach a penalty to his judgment. His powers are limited to prescribing a remedy within the statutes regulating the government of the institution. He can command the managers by an order *nisi* to do that which is necessary in his opinion, for the better administration of their trust; or, again, he may enjoin them from doing that which is manifestly injurious to the interests of those who are committed to their keeping. Thus, he may order a patient to be discharged who is illegally confined, either on account of not being insane, or whose commitment has not been approved by a competent court; and under the powers before enumerated the Commissioner may inquire not only into the legality of the original confinement in an asylum, but also into the legality of the continued detention of a patient therein. The purpose of this is obvious. Persons afflicted with insanity may recover their reason, or appearing to have done so may seek to be discharged from the custody of an asylum. In the former case, it may be presumed that the superintendent would not constitute himself a trespasser, by depriving them of their liberty, when the right to do so had expired with the disease. In the latter case, the appearance of recovery must necessarily precede the actual and established recovery, and it is at this stage, therefore, that the true legal status of the individual may require to be re-determined either to justify the further

confinement of the patient, or to enlighten the court in dealing with a petition for a supersedeas. Now, at common law, after office found against a lunatic, the Crown might have a *melius inquirendum* to be a supplement to a defect or uncertainty of a judgment. (*Ex parte Roberts*, 3 *Atkyns*, 5; *Viner's Abridg., ad verbum.*) It lies, therefore, whenever the first office wants certainty in divers points. (*The King v. Hethersal*, 3 *Mod.* 80; *The King v. Saloway*, *Ib.* 100.)

In like manner, and as part of his remedial powers, the Commissioner may require of the managers of an asylum better medical care and supervision or more attendants, better quality of food, drugs or clothing, or such additional household comforts as are essential to the proper sanitary care of patients and the promotion of their recovery. In case the order is disobeyed or negligently executed the Commissioner may, and it is his duty to, present the same for enforcement to a justice of the Supreme Court. At this point, however, the method of enforcing the order is made needlessly circuitous and cumbersome. As will be seen, the court, if it approve of the Commissioner's order, is, first of all, to issue its own order to the delinquent parties to show cause why the original order should not be enforced, and on failure to so show cause, the Commissioner's order is then to be affirmed by a second order of the court. Here then are three orders with incidental delays between each. Now, when the fact is recalled that the only wrongs which the Commissioner can redress are such as relate to personal liberty or creature comforts for helpless lunatics; wrongs which, in the eye of humanity, demand instant redress, no argument is needed to show why in such cases justice delayed is practically justice denied. It would have been simpler to have required the Commissioner to submit his order for approval to the court before issuing it. Then, disobedience of it could have been at once followed by a peremptory mandamus.

In England, in order that the right of visitation, wherever emanating, should not be subject to interference or dilatory exercise, it has long been settled that the jurisdiction of a visitor of an eleemosynary corporation is summary and without appeal. (1 *Burr*, 200; 1 *Bl. Com.* 479; 3 *Salk.* 380; *Dyer*, 209; 3 *Mod.* 265.) And it has accordingly been held that if a visitor is in his jurisdiction, his acts are not to be inquired into; if out of it, his acts are void. And it was there said that visitors have an absolute power which courts cannot control. (*The King v. The Bishop of Chester*, 1 *Wm. Bl.* 22; 2 *Kyd on Corp.* 282.)*

Statutory provisions looking to the same end give additional recognition to this doctrine and place it among positive principles of law. Accordingly, the Supreme Court of the United States has said in affirmance thereof, that "whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of such facts." (*Martin v. Mott*, 12 *Wheat.* 19, *A. D.* 1827; affirming *Vanderheyden v. Young*, 11 *Johns.* 150, *A. D.* 1814; *Allen v. Blunt*, 3 *Story's C. C.* 742; *Gould v. Hammond*, 1 *McAllister*, 235.)

As many complaints made to the Commissioner are preferred by the insane, it becomes necessary to determine in

* The doctrine of visitation of eleemosynary corporations is one hardly yet grafted upon the tree of American municipal law. With the exception of the Dartmouth College case relating to a private foundation, our courts have seldom been called upon to determine the rights of the State in visitation of charitable foundations of its own, independent of the trustees to whose care such charity has been confided. The creation of State boards of charities is the first step in recognition of a right of supervisory control over all its foundations by the power which created them. But that right can never be beneficially exercised as a remedial measure belonging to the equity supervision of the State so long as it necessitates the technical procedure of common-law tribunals to enforce it. Unless, therefore, the same power of summary jurisdiction is granted to the visitation of the State which attaches to the authority of a private foundation, there will continue to be a legalized irresponsibility in those administering our public charities against any thing but the ordinary visitation belonging to civil corporations at common law. We have not yet begun to draw sharp enough lines of discrimination between the duty of the State to its eleemosynary corporations, as contrasted with its civil.

each case the degree of mental competency of the witness before receiving his testimony. Insanity being a term of variable signification, covering many forms of mental aberration, the insane are not *ipso facto* disqualified at law from testifying. (*Regina v. Hill*, 2 *Denison's C. C.* 254; 3 *Dowl. Pr. Cas.* 161; *Kendall v. May*, 10 *Allen*, 59; 1 *Whart. Cr. L.* 752; *People ex rel. Norton v. Society of the New York Hospital*, 4th *Annual Report of State Comm. in Lunacy*, Jan., 1877, p. 24, also reported in *Am. Journal of Insanity for Jan.*, 1877.)

But the decisions of our State courts are uniformly against the competency of the insane as a class to testify. (*Livingston v. Kiersted*, 10 *Johns.* 362; *Hartford v. Palmer*, 16 *Ib.* 143; *Hoyt v. Ade*, 3 *Lans.* 173. See, also, *Holcomb v. Holcomb*, 28 *Conn.* 181.)

It will be seen, however, that in all the foregoing cases the rule, which might have been well enough, applied to the individual instances adjudicated upon, goes too far when made of universal application. Because some of the insane are incompetent to testify, it does not follow that all are. Modal conditions should be weighed in each witness, and if he reaches the average standard of intellectual capacity and is not otherwise disqualified or impeached, his testimony should be received. The reasons underlying the rule by which I have always been governed in a somewhat large experience of the credit to be attached to the testimony of the insane will be found elsewhere expounded in the sections relating to the "*testimonial capacity of the insane.*"

Although the Commissioner has no proper court, he has a jurisdiction, which, in the case of visitors, is held to give all the authority necessary anywhere within its limits. (*Phillips v. Bury*, 2 *T. R.* 352.) Hence he may exercise that authority wherever most beneficial to the public interests, and his investigations need not be held exclusively within the walls of asylums. He may inquire into all those forms of administrative negligence designated under

the general title of misfeasance, as more particularly enumerated in the statute. And his judgment, when announced to the party against whom it is directed, becomes of binding obligation within the terms prescribed by it. It is an order *nisi*, failing to obey which it is made the duty of the Commissioner to present the same to a justice of the Supreme Court, as has heretofore been shown.

§ 5. The superintendent or keeper of every county poor-house, city alms-house or other asylum where insane paupers are kept, shall, on or before the fifteenth day of November in each and every year, report to the State Commissioner in Lunacy the number of male and female insane, idiots and epileptics in his custody on the first day of November last past, together with a statistical exhibit of the number of admissions, discharges and deaths that have occurred within the past year among that class of persons, and the average weekly cost of their maintenance. He shall also state the actual condition of those discharged and the causes of death in those dying within the institution.

§ 6. Any superintendent or keeper of a county poor-house, city alms-house or other asylum where insane paupers are kept, who shall neglect to report as above recited, shall be guilty of a misdemeanor, and on conviction be subject to a fine of not less than fifty dollars nor more than two hundred and fifty dollars, and it shall be the duty of the district attorney of the proper county to proceed against such offenders according to law.

TITLE ELEVENTH.

GENERAL PROVISIONS.

SECTION 1. Nothing in this act shall be construed to affect either the term or tenure of office of any manager or boards of managers, or of any superintendent or resident officers of any State asylum who may now be in office.

§ 2. All laws or parts of laws inconsistent with or repugnant to the provisions of this act are hereby repealed.

§ 3. This act shall take effect immediately.

This section repeals all special acts which limit or abridge the powers of the State over its insane wards in county asylums wherever such special acts are in conflict with the general provisions of this title of the Revised

Statutes. The maxim fully applies here as between the State and its counties that *quando jus Domini ac subditi concurrunt, jus Domini præferri debet*.

IDIOTS.

In the definition given of lunatics (2 *R. S.*, Part 1, Ch. 20, Tit. 3, § 37), the statute excludes idiots by express terms; yet, by reason of their similar civil disfranchisement, includes them in all its provisions for the care of the persons and estates of the insane. Reference may, therefore, be made to these provisions for the method of protecting such persons and their estates.

An idiot, at common law, is defined to be "one that is a natural fool from his birth, so that it appears he hath no manner of understanding, reason, or government of himself." (*Bac. Abr.*, *Idiot*; *Coke Litt.* 247 a.) Such a person is manifestly disqualified at law from performing any acts requiring an exercise of the reasoning faculties. Legally speaking he has no *will*, and can, in consequence, have no assenting mind. His civil status is that of a mere blank, and he must always remain somebody's ward. "*Equum est*," says Grotius, "*ut qui se regere non potest, regatur aliunde*."

The old writ *de idiota inquirendo* directed the jury to find whether the party was an idiot, *a nativitate*, in contra-distinction from writs *de lunatico*, in which the finding was to declare when the lunacy began. And in conformity to this doctrine of the congenital character of idiocy, where a party was found by inquisition "an idiot, not having lucid intervals for the space of eight years past," it was held a good verdict on the ground that idiocy implied an infirmity *a nativitate*, and consequently the eight years were surplusage. (*Prodgers v. Frazier*, 3 *Mod.* 43; 1 *Vern.* 16.) An idiot, being thus civilly dead, can make no valid conveyance, can make no will, cannot enter into the marriage state, and can make no contract. No authorities need to be cited in

support of such a self-evident proposition, and as a corollary to it, no personal responsibility attaches itself to the acts of an idiot. He can commit no crime, although he may commit a tort and his estate will be responsible in damages for it. (*Matter of Heller*, 3 Paige, 199.)

In England, under the feudal system, the distinction between an idiot (*idiota a nativitate*) and a lunatic (*idiota a casu et infirmitate*) was an important one at law. The custody of a born idiot and of his lands was originally vested in the lord of the fee. (*Fry on Lunacy Acts*, 6.) But, says Blackstone, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent that it should be given to the King, in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress." (*Book 1, ch. 8, p. 303.*) The care of the estate of such persons henceforth became part of the fiscal prerogative of the Crown by statute 17 Edw. 2, ch. 9. (See *Hist. Lunacy Leg.*, p. 3.)

In our own State the care of the persons and estates of both idiots and lunatics was originally vested in the Chancellor (2 R. S. 54), and subsequently, by the Constitution of 1846, transferred to the Supreme Court, where it now resides, the several county courts and specified city courts having a concurrent jurisdiction over these same persons.

STATE ASYLUM FOR IDIOTS.

SECTION 1. The management for the Asylum for Idiots shall be vested in a board of trustees, consisting of the Governor, Lieutenant-Governor, Secretary of State, Comptroller, Superintendent of Public Instruction, and eight other persons. (§ 1, ch. 220, 1862.)

§ 2. Henry N. Pohlman, James H. Titus, Hamilton White, Allen Munroe, Hiram Putnam, Franklin Townsend, Lyman Clary and George H. Middleton, present trustees of the Asylum for Idiots, shall continue to be such trustees, and shall hold their office as follows: the said Franklin Townsend and George H. Middleton for two years, the said Allen Munroe and Hamilton White for four years, the said Henry N. Pohlman and Lyman Clary for six years, and the said James H. Titus and Hiram Putnam for eight years, from the thirty-first day of December, one thousand eight hundred and sixty-one, and until others are appointed in their places, subject, however, to being removed at any time by the Senate, upon the recommendation of the

Governor. Their successors shall be appointed by the Senate, upon the nomination of the Governor, and shall hold their offices for eight years, and subject to be removed in the manner aforesaid. The Senate may, in like manner, appoint a trustee for the unexpired term of office of any incumbent who shall die, resign, be removed from office, or cease to be an inhabitant of the State during his term, and such trustee shall be subject to removal in the manner above provided. Five members of the said board shall constitute a quorum for the transaction of business. (§ 2, *same ch.*)

§ 3. Said board shall have the general direction and control of all the property and concerns of the said asylum not otherwise provided by law, and shall take charge of its general interests, and see that its general design be carried into effect and every thing done faithfully, according to the requirements of the Legislature, and the by-laws, rules and regulations of the asylum. (§ 3, *same ch.*)

§ 4. The board shall appoint a superintendent, who shall be a well-educated physician, and a treasurer, who shall reside in the city of Syracuse, and give bonds to the people of the State for the faithful performance of his trust, in such sum and with such sureties as the Comptroller of the State may approve. The superintendent shall appoint a steward and a matron, who, together with the superintendent, shall constantly reside in the asylum, and shall be denominated the resident officers thereof. (§ 4, *same ch.*)

§ 5. The board shall, from time to time, determine the annual salaries and allowances of the resident officers of the asylum. But no determination as to said salaries, or either of them, nor any alteration of them, or either of them, shall be made unless there shall be present at a meeting of the board of trustees, the Governor, Lieutenant-Governor, Secretary of State, Comptroller, Superintendent of Public Instruction, or a majority of those officers, of whom the Comptroller shall be one.

§ 6. The salaries and allowances of the resident officers of the asylum shall be paid quarterly on the first days of October, January, April and July in each year, by the treasurer of the asylum, on presentation of the bills therefor, audited, allowed and certified as prescribed in the by-laws.

§ 7. The trustees may take and hold in trust for the State any grant or devise of land, or any donation or bequest of money or other personal property, to be applied to the maintenance and education of idiots, and the general use of the asylum. (§ 7, *same ch.*)

§ 8. The trustees are hereby directed and empowered to establish such by-laws as they may deem necessary and expedient for regulating the appointment and duties of officers, teachers, attendants and assistants, for fixing the conditions of admission, support and discharge of pupils, and for conducting in a proper manner the business of the asylum; also to ordain and enforce a suitable system of rules and regulations for the internal government, discipline and management of the asylum. (§ 8, *same ch.*)

§ 9. The superintendent shall be the chief executive officer of the asylum. He shall have the general superintendence of the buildings, grounds and farm, together with their furniture, fixtures and stock,

and the direction and control of all persons employed in and about the same, subject to the laws and regulations established by the trustees. He shall have the appointment of his co-resident officers, with power to assign them their respective duties, subject to the by-laws. He shall employ, subject to the supervision of the board of trustees, such teachers, attendants and assistants as he may think proper and necessary for the economical and efficient carrying into effect of the design of the institution, prescribe their several duties and places, and fix their compensation, and may discharge any of them. He shall, also, from time to time, give such orders and instructions as he may judge best calculated to induce good conduct, fidelity and economy in any department of labor and expense, and he is authorized and enjoined to maintain salutary discipline among all who are employed by the institution, and to enforce strict compliance with such instructions, and uniform obedience to all the rules and regulations of the asylum. He shall further cause full and fair accounts and records of all his doings, and of the entire business and operations of the institution, together with the condition and prospects of the pupils, to be kept regularly, from day to day, in books provided for that purpose; and he shall see that all such accounts and records shall be fully made up to the first days of April and October in each year, and that the principal facts and results, with his report thereon, be presented to the board at its semi-annual meetings. The exercise of the foregoing powers shall be subject to the approval of the trustees, except as herein otherwise provided. He shall conduct the official correspondence of the institution, and keep a record of the applications received, and the pupils admitted, and he shall be accountable for the careful keeping and economical use of all furniture, stores and other articles provided for the asylum, and prepare and present to the board at its semi-annual meetings a true and perfect inventory of all the personal property and effects belonging to the asylum. (§ 9, *same ch.*)

§ 10. The resident officers of the asylum and all the teachers, attendants and assistants actually employed therein, during the time of such employment shall be exempt from serving on juries, from all assessments of labor on the highways, and in time of peace from all service in the militia; and the certificate of the superintendent shall be conclusive evidence of such employment. (§ 10, *same ch.*)

§ 11. The board shall keep in a bound book, to be provided for that purpose, a fair and full record of all its doings, which shall be open at all times to the inspection of any of its members, and of all persons whom the Governor or either house of the Legislature may appoint to examine the same. (§ 11, *same ch.*)

§ 12. The board of trustees shall maintain an effective inspection of the affairs and management of the institution, for which purpose the board shall meet at the asylum twice in each year, at such times as the by-laws shall provide; and a committee of three trustees, to be appointed by the board at the annual meeting thereof, shall visit it once in every month. Such committee shall also perform such other duties, and exercise such other powers, as shall be prescribed by the by-laws, or as the board may, from time to time, ordain. (§ 12, *same ch.*)

§ 13. It shall be the duty of the resident officers to admit any of the trustees into every part of the asylum, and to exhibit to him or them,

on demand, all the books, papers, accounts and writings belonging to the institution, or pertaining to its business management, discipline or government; also, to furnish copies, abstracts and reports whenever required by the trustees. (§ 13, *same ch.*)

§ 14. The treasurer shall have the custody of all moneys, bonds, notes, mortgages, and other securities and obligations belonging to the asylum. He shall keep full and accurate accounts of receipts and payments, in the manner directed in the by-laws, and such other accounts as the trustees shall prescribe. He shall balance all the accounts on his books annually, on the first day of October, and make a statement of the balances thereon, and an abstract of all the receipts and payments of the past year, which he shall, within three days thereafter, deliver to the auditing committee of the trustees, who shall compare the same with his books and vouchers, and verify the same by a further comparison with the books of the superintendent, and certify the correctness thereof to the trustees at their annual meeting. He shall further render a quarterly statement of his receipts and payments to said auditing committee, who shall compare and verify the same as aforesaid, and report the result, duly certified, to the trustees at the annual meeting thereof, who shall cause the same to be recorded in one of the books of the asylum. He shall further render an account of the state of his books, and of the funds and other property in his custody, whenever required so to do by the trustees. (§ 14, *same ch.*)

§ 15. Said treasurer is also authorized to receive, for the use of the asylum, any and all sums of money which may be due upon any note or bond in his hands belonging to the asylum; also, any and all sums which may be charged and due according to the by-laws of the asylum, for the support of any pupil therein, or for actual disbursements made in his behalf for necessary clothing and traveling expenses, in an action in the Supreme Court, to be brought in said treasurer's name, as treasurer of the asylum for idiots, and which shall not abate by his death, removal or resignation, against the individual or county liable therefor, and having neglected to pay the same when demanded by the treasurer, in which action judgment shall be rendered for such sum as shall be found due, together with costs, and interest from the time of the demand made as aforesaid. Every such action may be brought in the county of Onondaga. Said treasurer may also, upon the receipt of the money due upon such judgment, or upon any mortgage in his hands belonging to the asylum, execute a release, and acknowledge full satisfaction thereof, so that the same may be discharged of record. (§ 15, *ch.* 220, 1862.)

§ 16. The superintendent shall, at the time of the admission of any pupil into the asylum, enter in a book, to be printed and kept for that purpose, a minute, with date, of the name and residence of the pupil, and of the person or persons upon whose application he is received; together with a copy of the application, statement, certificate and all other papers accompanying such idiot; the originals of which he shall file and carefully preserve. (§ 16, *same ch.*)

§ 17. The supervisors of any county in the State, from which State pupils may be selected and received into the asylum, are hereby authorized and required, while such pupils remain at the asylum, to

raise the sum of thirty dollars annually for the purpose of furnishing suitable clothing for each pupil from said county, and, on or before the first day of April in each year, pay over the same to the treasurer of the asylum. The superintendent shall, on the reception of any pupil, give notice thereof to the clerk of the board of supervisors of the county from which such pupil shall have been sent. (§ 17, *ch.* 220, 1862, *as amended by ch.* 739, 1867.)

§ 18. There shall be received and supported gratuitously in the asylum one hundred and twenty pupils, to be selected in equal numbers, as near as may be, from each judicial district, from those whose parents or guardians are unable to provide for their support therein, to be designated as State pupils; and such additional number of idiots as can be conveniently accommodated may be received into the asylum by the trustees on such terms as may be just. But no idiot shall be received into the asylum without there shall have been first lodged with the superintendent thereof a request to that effect, under the hand of the person by whose direction he is sent, stating the age and place of nativity, if known, of the idiot, his Christian and surname, the town or city and county in which they severally reside, the ability or otherwise of the idiot, his parents or guardians to provide for his support in whole or in part, and if in part only, then what part; and the degree of relationship, or other circumstance of connection between him and the person requesting his admission, which statement shall be verified in writing by the oath of two disinterested persons, residents of the same county with the idiot, acquainted with the facts and circumstances so stated, and certified to be credible by the county judge of the same county. And no idiot shall be received into said asylum unless the county judge of the county liable for his support shall certify that such idiot is an eligible and proper candidate for admission to said asylum as aforesaid, provided, however, that idiots may be received into said asylum upon the application therefor signed officially by any county superintendent of the poor, or by the commissioners of charity of any of the cities of this State, where such commissioners exist. (*As amended by ch.* 72, *Laws of* 1878.)

§ 19. Whenever the trustees shall direct a State pupil to be discharged from the asylum, the superintendent thereof is authorized to return such pupil to the county from which he was sent to the asylum, and deliver him to the keeper of the poor-house of such county; and the superintendents of the poor of said county shall audit and pay the actual and reasonable expense of such removal, as part of the contingent expenses of said poor-house. But if any town, county or person be legally liable for the support of such pupil, the amount of such expenses may be recovered for the use of the county by such superintendents of the poor. If such superintendents of the poor neglect or refuse to pay such expenses, on demand, the treasurer of the asylum may pay the same and charge the amount to the said county, and the treasurer of the said county shall pay the same, with interest, after thirty days, out of any fund in his hands not otherwise appropriated; and the supervisors of the said county shall levy and raise the amount as other county charges. (§ 19, *same ch.*)

§ 20. The superintendent is authorized to agree with the parent, guardian or committee of any idiot, or with any other person or persons, for the support, maintenance and clothing of any idiot, at the asylum, upon such terms and conditions as may be prescribed by the by-laws, or approved by the trustees. But every parent, guardian, committee or other person applying for the admission into the asylum of any idiot who, or whose parents or guardians, are of sufficient ability to provide for his maintenance therein, shall, at the time of his admission, deliver to the superintendent a bond, with one or more sureties, to be approved by the trustees in such a manner as they shall prescribe, in the penal sum of at least three hundred dollars, conditioned to pay to the treasurer, for the time being, of the asylum, by his name of office, all such sum or sums of money, at such time or times as shall be agreed upon as aforesaid; and to remove such idiot from the asylum, free of expense to the trustees, within twenty days after the service of the notice hereinafter provided. And if such idiot, or his parents or guardians, are of sufficient ability to pay only some portion less than the whole of the expenses of supporting and clothing him at the asylum, said bond shall be conditioned only for his removal as aforesaid; and the superintendent may take security by note or other written contract or agreement, with or without sureties, as he may deem proper, for such portion of the said expenses as the idiot, his parents or guardians, are able to pay, subject, however, to the approval of the trustees, in the manner that shall be prescribed in the by-laws. Notice to remove any idiot from the asylum shall be in writing, signed by the superintendent; it shall be directed to the parents, guardians, committee or other person or persons upon whose request he was received, at the place or places of residence mentioned in such request, and may be served by depositing the same in the post-office in the city of Syracuse, and with the postage prepaid. If the idiot shall not be removed from the asylum, according to the conditions of said bond, within twenty days after the service of such notice in manner aforesaid, he may be removed and disposed of by the superintendent, as directed in the last preceding section in relation to State pupils, and all the provisions of that section respecting the payment and recovery of the expenses of the removal and disposition of a State pupil shall be equally applicable to similar expenses arising under this section. (§ 20, *ch.* 220, 1862.)

§ 21. The provisions of section nineteen of this act (§ 1820) shall be applicable to all State pupils now in the asylum. And any bond, bill, note, agreement, undertaking or other security for the maintenance or support of any pupil at the asylum, heretofore made by any person in his behalf and now belonging to the asylum, shall be valid and effectual in law, and may be prosecuted as provided in section fifteen (§ 1816) of this act. (§ 21, *same ch.*)

§ 22. All laws and parts of laws inconsistent with the provisions of this act are hereby repealed. (§ 22, *same ch.*)

CHAPTER FOURTH.

(HABITUAL DRUNKARDS. (2 R. S., PART 2, CHAPTER 5, TIT. 2.)

CARE OF THEIR ESTATES.

Habitual drunkards, when judicially declared so, are, in respect to the control and management of their estates, so far assimilated in our statutes to the insane, that, except as to the procedure for establishing the fact of drunkenness, all the provisions relating to their estates contained in this title, are re-enacted with amendments, and superseded by chap. 446 of the Laws of 1874 (*Tit. 2d*), as hereinbefore commented upon.

Section 1, being the same in both titles, is not repeated here. It will be found in its appropriate place on page 108. For all other questions relating to habitual drunkards, see the various sections in the Revised Statutes, the chapter on Testamentary Capacity, and the chapter on Criminal Responsibility.

HABITUAL DRUNKARDS BEFORE THE LAW.

The position occupied by habitual drunkards before the law is one of a somewhat ambiguous character. After office found they are civilly disfranchised in common with all persons under legal guardianship; yet, from the earliest mention of them as a class in the Revised Statutes, they are distinctively separated from the insane, although for convenience sake referred to and mentioned in connection with them. Thus, in the first edition of the Revised Statutes of 1829 (2 *R. S.* 52, § 1), the first section of chap. 30 of the Laws of 1801 is amended, by introducing into it so much of section 1, of chap. 109 of the Laws of 1821, as assimilates habitual drunkards to lunatics, and gives the custody

of their persons and estates in like manner to the Chancellor. By this section it is enacted that "the Chancellor shall have the care and custody of all idiots, lunatics, persons of unsound mind, *and* persons who shall be incapable of conducting their own affairs, in consequence of habitual drunkenness, etc.; and shall provide for their *safe-keeping* and maintenance," etc. This, it has been held, is, in the use of the conjunction "*and*," a plain and intended distinction drawn between lunatics and habitual drunkards. Had the conjunction used been "*or*," there might have been some doubt as to whether the Legislature did not intend that habitual drunkards should be considered as lunatics absolutely. But under the actual language of the statute there can be only one interpretation given to it, which is that above stated. This whole subject underwent a very thorough analysis in *Lewis v. Jones* (50 Barb. 670), where the court, after reviewing and discussing the leading authorities, said very pointedly, and in full accordance with the manifest spirit and intent of the statute, that, "strictly speaking, a man is not of unsound mind, simply because he is an habitual drunkard. His mind is unsound only while the fit of intoxication lasts. And that is all that is adjudged by an inquisition finding him to be an habitual drunkard."

And in *Ex parte Janes* (30 How. Pr. 453), the court in like manner observed that "inebriates cannot be treated as lunatics, unless they are lunatics as well as inebriates." Both these decisions re-affirm the doctrine laid down by Sir JOHN NICOLL, in *Ayrey v. Hill* (2 Add. 209), that "there can scarcely be such a thing as latent ebriety." Whatever, therefore, may be the views of habitual drunkenness entertained by physicians, it is evident that the law leaves its relations to mental competency, like any other question of fact, to be determined by the ordinary rules of evidence applicable to the circumstances of the particular case.

The term "*safe-keeping*" employed in the statute above

quoted, and which is repeated in chap. 446 of the Laws of 1874 (*Tit.* 2, § 1), when applied to habitual drunkards, in distinction from lunatics, must be interpreted to mean, that for purposes of reformation the court may direct, through the committee of the drunkard, the place of residence, and the degree of personal restraint which shall be imposed upon him. And should no other place be deemed capable of affording means for his reformation except a lunatic asylum, the court may, in the exercise of its discretionary power, order his confinement there. It may also order his real estate to be sold for his maintenance while so confined. (*Matter of Hoag*, 7 *Paige*, 312.)

But before his confinement in an asylum he will have to be examined in the ordinary way by two physicians, without whose certificates the court has no original power of committing him there. The same rule applies to the State Inebriate Asylum. In the case of the Inebriates' Home for Kings county, the power is given to magistrates to commit any person convicted before them as an habitual drunkard, to that institution. (See 2 *R. S.*, 6th *Ed.*, p. 891.)

§ 2. Whenever the overseers of the poor of any city or town in this State discover any person, resident therein, to be an habitual drunkard, having property to the amount of two hundred and fifty dollars, which may be endangered by means of such drunkenness, it shall be their duty to make application to the Supreme Court for the exercise of its powers and jurisdiction.

Until the passage of chap. 627 of the Laws of 1875, relating to the Inebriates' Home for Kings county, our statutes, although making provision for dealing with the offense of habitual drunkenness when publicly associated with disorderly conduct, and also prescribing measures analogous to inquisitions of lunacy for placing the person and property of habitual drunkards under guardianship, had yet given no definition of a common or habitual drunkard.

The statute, giving the overseers of the poor power to inquire into cases of habitual drunkenness, was manifestly pointed at substances alone which are capable of being

drunk. The terms constantly used are "spirituous liquors," "strong or spirituous liquors or wines." These are terms of description and definition, and inferentially exclude the idea of any substances which may be eaten or smoked like opium or hasheesh, or which again may be inhaled like ether or chloroform. It is doubtful whether, under a vigorous construction of this as a penal statute, we could import, by analogy of effects, substances not distinctly enumerated therein. Hence, an opium or hasheesh eater or smoker might be habitually intoxicated by these, and yet in legal intendment he is not an "habitual drunkard." He might be rendered periodically insane by these agencies, and become at last mentally incapable of managing his own affairs, and still not be, under the statute, an "habitual drunkard." This proposition was very fully considered in the case of *Comm. v. Whitney* (11 *Gray*, 477), where it was held, that under the statute to punish "common drunkards" (no other but intoxicating *liquors* being mentioned in such statute), evidence of habitual intoxication from the use of chloroform would not sustain an indictment. And in the same case in a previous complaint (*Comm. v. Whitney*, 5 *Gray*, 85), it was held that in order to be a *common* drunkard a man must be habitually drunk to the disturbance of the public peace and good order, the adjective "common" referring to the publicity of the act, while the term "drunkard," by itself, was held to imply habitual or chronic habits of drinking, and, therefore, that the terms "drunkard" and "habitual drunkard" meant the same thing.

In *Ludwick v. The Comm.* (18 *Penn.* 172), and *Comm. v. McGinnis* (20 *Pittsb. L.J.* 54), it was held that occasional acts of drunkenness will not constitute the person an habitual drunkard; but it is not necessary that he should constantly be in an intoxicated state; a *fixed habit* of drunkenness will constitute a person an habitual drunkard. This decision may be said to represent most correctly the legal idea of a drunkard. It does not require permanent intoxi-

cation of the individual to the degree of producing total mental incapacity which, physiologically, could exist only for a short time, since cerebral congestion, gastritis and delirium in some form, would soon exhaust the system and terminate life. Nor does it again adjudge him to be a legal drunkard who occasionally, that is to say, at irregular intervals, becomes intoxicated for a short time, and as a primary consequence of drinking. But it requires that the habit of drinking should have become so fixed that the habit itself is the tempter to the indulgence in drink, and that the indulgence in turn, instead of satisfying the appetite, should provoke it to an insatiable demand for more, so that an habitual drunkard is one who, when craving drink, cannot be satisfied with its primary effects, but continues to need it because of the fixed habit of needing it which over-indulgence has begotten in him.

The subject has now received a statutory definition, and by § 7 of chap. 627 of 1875, it is enacted, that the term "habitual drunkard" shall apply to all persons who, either by reason of habits of periodical, frequent or constant drunkenness, induced either by the use of alcoholic or vinous or other liquors or opium, or other narcotic, or intoxicating or stupefying substances, shall, on trial and conviction, be found to be incapable or unfit to properly conduct their own affairs, or to be dangerous to themselves or others, or to neglect or fail to support themselves, or those legally chargeable to them for maintenance."

As to what constitutes an habitual drunkard for whom a committee of the person and estate may be appointed, Chancellor WALWORTH, in the *Matter of Tracy* (1 Paige, 582), observed, that "a very erroneous impression appeared to have gone abroad on that subject. It was supposed by many that the prosecutor in such cases is bound to prove, affirmatively, that an habitual drunkard is incapable of managing his affairs. On the contrary, the fact that a person is, for any considerable part of the time, intoxicated to

such a degree as to deprive him of his ordinary reasoning faculties, is *prima facie* evidence at least that he is incapacitated to have the control and management of his property." This doctrine was fully recognized and re-affirmed in the Pennsylvania case, cited above, where it was held that habitual drunkenness is equivalent to such unsoundness of mind as operates to the destruction of all business capacity. If a person, therefore, be found, by inquest, to be an habitual drunkard, it is not necessary for such finding to state that he is incapable of managing his estate; such incapacity is a conclusion of law. (*Ludwick v. Comm.*, 18 Penn. St. 172.)

Under 2 R. S. 52, § 1, the power of the Chancellor, which, by the original act of 1821, was limited to *estates* of habitual drunkards, is extended to their *persons*. That power, both by the Constitution of 1846; the Code, § 30, subd. 8; and chap. 446 of 1874, Tit. 2, § 1, is now transferred to the Supreme and the County Court. It is the same power which may be exercised by them in the case of idiots and lunatics, with concurrent jurisdiction. Under that power the court has, through the committee, perfect control over the person of the habitual drunkard, and the committee, subject always to the court's control, may select the place of residence of such drunkard.

The committee is responsible for the consequences of his neglect to take proper care of the person of such drunkard. And it is the duty of the court to aid and protect the committee in the proper exercise of that right. Therefore, where a third person, without the consent and against the wishes of the committee, has the custody of, or harbors the habitual drunkard, the committee should apply to the court *ex parte* for an order that such person deliver the drunkard up to the committee, or cease from harboring him, and if such order is disobeyed, the party will be punished for contempt of court. (*Matter of Lynch*, 5 Paige, 120.)

The guardian or committee of an infant or *non compos* is, under the court's control, alone to decide as to the proper

place of residence of his ward. He stands as the bailiff of the court and may exercise any choice in this matter which he deems best for the interests of the ward; and the court will always sustain him in enforcing any reasonable rules or taking any proper steps looking toward the protection of his charge. Thus in *Hale v. Hale* (3 *Atk.* 721), Lord HARDWICKE compelled a young gentleman, who had left Eton school contrary to the direction of his guardian, to return there. In *Tremain's* case (1 *Strange*, 168), Lord MACCLESFIELD compelled a young student, who, in disobedience of his guardian's orders to go to Cambridge, had gone to Oxford, to return to Cambridge, and on his going a second time to Oxford, his Lordship had him re-conveyed to Cambridge.

In the case of *Cranmer*, a lunatic (12 *Ves.* 455), upon representations made to Chancellor ERSKINE, that in the morning after the execution of the commission the lunatic had been removed from his house in Essex to London, an order was made directing any person in whose custody the lunatic might be to deliver him to the committee of his person. In *Lord Wenman's* case (1 *P. Wms.* 702), where his wife, after the making of an order for producing her husband on the execution of a commission, assisted in his removal from place to place, she was, although an Irish peeress, committed to prison for a contempt, the Chancellor, Lord MACCLESFIELD, saying, that where there was such a presumption of lunacy, the wife, though otherwise under the power of the husband, might well be supposed to have him under her power.

The peculiar office of the committee of an habitual drunkard, which, among other things, contemplates taking measures to secure the reformation of his ward, gives him to that extent the right of preventing that ward from having access to any means of intoxication. And this right includes that also of restraining others from giving drink to the habitual drunkard.

Hence, if the committee of an habitual drunkard finds that any person is furnishing the drunkard with the means of intoxication, he should apply to the court for protection against such an interference with his duties. (*Matter of Heller*, 3 *Paige*, 199.)

§ 3. If such drunkard have property to an amount less than two hundred and fifty dollars, the overseers may make such application to the County Court of the county, which is hereby vested with the same powers in relation to the person and real and personal estate of such drunkard, as are by this title conferred on the Supreme Court, and shall in all respects proceed in the like manner, subject to an appeal to the Supreme Court.

Proceedings instituted in the Court of Chancery prior to 1846, for the appointment of a committee of the person and estate of an habitual drunkard, and pending at the time the Constitution of 1846 went into effect, by force of that Constitution became vested in the Supreme Court, and not in the County Court. (*Scribner v. Qualtrough*, 44 *Barb.* 431.) The present provision, it will be seen, extends that power to the County Court. That jurisdiction, as expressed in the Code (§ 340, subd. 4,) is general and not limited to those having estates less than \$250. The only condition imposed is the residence of the person proceeded against within the county. In all other respects the jurisdiction is concurrent with that of the Supreme Court. (*Chap.* 446 of 1874, *Tit.* 2, § 1; *Davis v. Spencer*, 24 *N. Y.* 388, *overruling Smith's case*, 16 *How. Pr.* 567.)

§ 4. Application for a commission in such case may be made in vacation to the county judge of the county, who may award the same to one or more proper persons to inquire into the fact of such alleged habitual drunkenness; and the inquisition taken thereon shall be returned to the next County Court of the county, who shall confirm or set aside the same.

The jurisdiction conferred upon the Court of Common Pleas, and in vacation upon the first judge of the county, to take jurisdiction of applications in cases of habitual drunkards, made by the overseers of the poor, when the property of the drunkard was less than \$250 in value, did not interfere with or divest the jurisdiction conferred generally upon

the Chancellor, but simply authorized a special proceeding in a single special case. (2 *R. S.*, p. 52, § 24; *Davis v. Spencer*, 24 *N. Y.* 388.)

§ 5. If the party proceeded against shall traverse the inquisition on its return, an issue shall be directed by the court, as in other cases, which shall be tried in the same court, and the verdict thereon shall have the same effect as if rendered upon an issue awarded by the Supreme Court.

§ 6. Appeals from any order, judgment or decree of a County Court, made pursuant to the provisions of this title, shall be filed and entered within three months after the making of such order, judgment or decree, and shall be accompanied by a bond with such sureties as the court shall approve to the opposite party, in the penalty of one hundred dollars, conditioned for the payment of such costs as shall be awarded against the appellant in case of the order, judgment or decree being affirmed.

§ 7. The expenses of the overseers of the poor, in conducting any application under this title, shall be audited and allowed in the same manner as other expenses of such city or town.

The remaining provisions of this title are re-enacted in chapter 446 of 1874, Tit. 2d, without amendments, except in section 17 of the new revision, where the words "person of unsound mind" are substituted in the second and ninth lines for the words "other person above specified," in the second line, and "other person," in the eighth line, of the original.

EFFECT OF HABITUAL DRUNKENNESS ON CIVIL RIGHTS.

Before office found an habitual drunkard may unquestionably make valid contracts, the degree of his intoxication, if sufficient to raise a presumption of mental incapacity, being a question of fact to be decided according to the circumstances of the case. There can be no fixed standard or arbitrary rule drawn up by which to determine the limits of mental competency, where the border line may be so easily crossed and recrossed as in periods of habitual intoxication. During a heavy debauch, when covering a space of several days or weeks, a man may frequently pass from perfect mental competency to perform a valid act to as perfect mental incompetency. Therefore, where a party accus-

tomed to have periods of intoxication extending over several weeks, voluntarily gave checks in payment for liquor and food sold him during this time, and also for money lent, *held*, that he could not ordinarily maintain an action for the recovery of the money paid. (*Hayes v. Huffstater*, 65 *Barb.* 530.)

But if moneys are obtained from a person when in such a state of intoxication as to be incapable of transacting business, or of knowing what he is about, this would be a clear fraud, and the moneys may be recovered back. (*Ib.*)

Hence, if a party to a contract, while in a state of intoxication, has been defrauded, he may avoid or rescind the contract at his election; but if he elects to rescind he must do so in reasonable time after the fraud is discovered, and must restore, or offer to restore, whatever he has recovered under the contract. (*Willoughby v. Moulton*, 47 *N. H.* 205; *Chitty on Cont.* 680; *Campbell v. Fleming*, 1 *Ad. & Ellis*, 40; *Cook v. Gilmore*, 34 *N. H.* 556; *Pitt v. Smith*, 3 *Campb.* 33; *Gore v. Gibson*, 13 *M. & W.* 623.)

And so long as he acquiesces in it it cannot be impeached by third parties on the ground that it was executed by him when drunk. (*Eaton's Admr. v. Perry*, 29 *Mo.* 96; *Nagle v. Baylor*, 3 *Dr. & W.* 60.)

Courts of equity will always scrutinize with a jealous eye contracts or conveyances made by a party in such a state of intoxication as to justify a doubt of his mental competency. They will, in consequence, protect him against his own acts done in a state of insanity, either at his instance or that of his representatives, although that condition of mind was self-produced in the form of drunkenness. (*Wigglesworth v. Steers*, 1 *Hen. & Munf.* 70; 1 *Parsons on Cont.* 310; *Bliss v. Conn. & Pass. R. R. Co.*, 24 *Vt.* 424.) Relief in like manner will be extended to acts done by a party when too intoxicated to exercise an assenting mind, or a sound and disposing judgment; or again, when the act is done before restoration to a state of

mental competency from the effects of such drunkenness (1 *Story's Eq. Jur.*, §§ 231-2; *Hall v. Warren*, 9 *Ves. Jr.* 608), although there will be exceptions to this rule as in cases where parties cannot be replaced *in statu quo*. (*Neill v. Morley*, 9 *Ves. Jr.* 478; *Menkins v. Lightner*, 18 *Ill.* 282.)

It is necessary to bear in mind, however, in this connection, that intoxication *per se* has no definite meaning in law. It is always a question of fact dependent upon degrees of intensity, and, like all similar questions, its character as an element for computing mental competency at any given time, is to be judged of by its effects upon the demeanor, conversation and mental poise of the individual. Had he at the time a correct conception of how the particular transaction would affect his interests; and, second, had he an assenting mind in the legal import of that term? If he had, then slight intoxication, though visible and demonstrable, will not invalidate his acts, for he may still be *compos mentis*.

Therefore, it has been held that, as a general rule, a court of equity will not assist a person who has obtained or wishes to get rid of an agreement or deed on the mere ground of intoxication, except where some contrivance was resorted to for the purpose of inducing him to drink, or some unfair advantage taken of his situation, or where he had reached that extreme state of intoxication entirely depriving him of the use of his reason. (*Cooke v. Clayworth*, 18 *Ves.* 12; 4 *Desauss. Ch.* 364; *Arnold v. Hickman*, 6 *Mumf.* 15; *Campbell v. Ketcham*, 1 *Bibb*, 406.)

Where a party has been found incapable of managing his affairs by reason of habitual drunkenness, the court will not discharge his committee and restore the property to him, upon mere proof of the fact that he is competent to manage his affairs, without evidence of a permanent reformation. And as a general rule, the court require, as evidence of a permanent reformation, satisfactory proof that

the habitual drunkard has voluntarily refrained from the use of intoxicating liquors for at least one year immediately preceding the application for the restoration of his property. (*Matter of Hoag*, 7 *Paige*, 312.)

So far as the public are concerned, in their dealings with parties against whom commissions of lunacy have been issued or findings thereon returned, it is now well settled that proceedings against one as an habitual drunkard are analogous to proceedings *in rem*, and are, in consequence, presumed to be known to all who subsequently deal with him. The granting of the commission, and its entry as matter of record in the clerk's office of the court from which it is issued, is such constructive notice as should put every one upon their guard in dealing with the alleged lunatic. Accordingly, where the indorser of a bill of exchange who had, prior to its maturity, been found an habitual drunkard, by a written instrument made after such finding and before the appointment of a committee, and while sober, waived protest, in consequence of which the holder omitted to have notice served, held that the waiver was void. (*Wadsworth v. Sharpsteen*, 8 *N. Y.* 388.) And the reason of this is found in the civil death which follows as a consequence, the finding of an inquisition of drunkenness against any one, so that, as was said in the case last cited, such incapacity is presumed to be known by all who deal with him.

After one has, by inquisition, been found an habitual drunkard, he cannot, until it is vacated, or a committee thereon superseded, even in his sober intervals, make contracts to bind himself or his property.

But a judgment obtained against an habitual drunkard or lunatic after the appointment of a committee is not void, and no action can be maintained by such committee against the judgment creditor. The proper way of proceeding is to apply to the court appointing the committee for relief from the judgment, and for an order punishing such

judgment creditor for contempt. (*Crippen v. Culver*, 13 Barb. 424; *Clark v. Dunham*, 4 Denio, 262; *Matter of McLaughlin*, *Clark's Ch. Cas.*)

The effect of an inquisition and a finding of habitual drunkenness is to disqualify the party as to acts *inter vivos*, because they are in contravention of the power vested in the court to protect and care for his property for his benefit, and are in contempt of the order of the court. But this disfranchisement does not necessarily extend to all the civil acts or rights of such a person. Thus, in Pennsylvania it has been held that an habitual drunkard is not disqualified for acting as an executor or administrator (*Sill v. McKnight*, 7 W. & S. 244), and that an inquisition finding a person to be an habitual drunkard is only *prima facie* evidence and not conclusive of want of testamentary capacity. (*Lecky v. Cunningham*, 56 Penn. St. 370.) But such person is thereby rendered incompetent to perform any subsequent acts entailing civil obligations upon himself or his estate. (*Imhoff v. Witmer's Adm'r*, 31 Penn. St. 243; *Klohs v. Klohs*, 61 *Ib.* 245.)

In relation to the right of testamentary disposition, it is well settled that an habitual drunkard, although under a committee, is not necessarily incompetent to make a will. Such a person, if of sufficient mental capacity, may make a valid will notwithstanding the commission, for the existence of the commission is only *prima facie* evidence of incapacity, and may be rebutted by proof. (*Lewis v. Jones*, 50 Barb. 672.)

And in a leading case in this State, the court observed, that "the right of testamentary disposition is regarded as a common and natural right to be restrained no further than public policy and the necessary evidence of intent and consent absolutely require. When the testator is shown to possess such a rational capacity as the great majority of men possess, that is sufficient to establish his will." (*Stewart v. Lispenard*, 26 Wend. 306.)

PERSONAL CARE OF HABITUAL DRUNKARDS. (2 R. S., PART 1, CH. 20, TIT. 4, 6th EDITION.)

Custody and Confinement.

SECTION 1. Whenever the overseers of the poor of any city or town shall discover any person to be an habitual drunkard, they *may*, by writing under their hands, designate and describe such drunkard, and by written notice, signed by them, require every merchant, distiller, shopkeeper, grocer, tavern-keeper, or other dealer in spirituous liquors, and every other person residing within the city or town where such drunkard shall reside, or in any other city or town near to or adjoining such city or town, not to give or sell, under any pretense, any spirituous liquors to such drunkard.

This section was amended by § 3 of chap. 229 of the Laws of 1840, by substituting "*shall*" for "*may*."

§ 2. If, after the personal service of such notice, any such person shall knowingly give or sell, in any manner whatever, spirituous liquors to any such drunkard, except by the personal direction or on the written certificate of some physician, regularly licensed to practice, according to the laws of this State, stating that such liquor is necessary for the preservation or recovery of the health of such drunkard, he shall forfeit for every offense the sum of ten dollars, for the use of the poor of the town where such drunkard resides.

§ 3. Any person so designated by the overseers of the poor as an habitual drunkard may apply to any justice of the peace of the city or town in which the person so designated resides, for process to summon a jury to try and determine such fact of drunkenness.

§ 4. On such application, the justice shall immediately give notice thereof in writing to the overseers of the poor, specifying the time and place where the parties shall meet for the trial of such fact, and shall issue a venire to any constable to summon a jury of twelve persons, competent to serve on juries, to appear at the said time and place for the purpose of trying the said fact.

§ 5. Such jury shall be summoned, returned, and six of them shall be balloted for by such justice, and shall be sworn well and truly to try the fact of the alleged drunkenness, in the same manner as for the trial of issues in suits brought before a justice of the peace; and witnesses shall be summoned, and their attendance and testimony enforced, and they shall be sworn and examined before the said jury in like manner.

§ 6. The said jury shall hear the allegations and proofs offered on both sides, and shall proceed, in all respects as in trials at law, to render their verdict; which verdict shall be entered by such justice in a book to be provided by him for the purpose.

§ 7. The said verdict, or an attested copy thereof, under the hand of such justice, shall be received and deemed to be presumptive evidence of the fact thereby found, in any action between the overseers of the poor and any person prosecuted by them for the penalty hereinbefore imposed.

§ 8. If by the verdict of the jury it shall be found that the person demanding such trial is an habitual drunkard, the justice shall enter judgment against such person, and award execution for the costs of the overseers of the poor in attending such trial, in the same manner as in suits between individuals, which justices of the peace are authorized to try and determine.

§ 9. If it be found that such person is not an habitual drunkard, such justice shall in like manner enter judgment and award execution for the costs of such person against the said overseers, unless it shall appear to such justice that the said overseers acted in good faith, and had reasonable cause to believe such person an habitual drunkard; in which case no costs shall be awarded against them, but each party shall pay their own costs.

§ 10. The accounts of the overseers of the poor for the expense of defending against any such application shall be audited and allowed in the same manner as the other expenses of such city or town.

§ 11. If at any time the overseers of the poor shall be satisfied that such drunkard has reformed and become temperate they may revoke and annul any such notice given by them or any of their predecessors in office.

§ 12. Every person upon whom the notice mentioned in section first, title four, chapter twenty, first part of the Revised Statutes has been served, shall be liable to the forfeiture prescribed in the second section of the same title, whenever any clerk, agent or member of the family of such person shall knowingly give or sell, in any manner whatever, spirituous liquors to any person designated as an habitual drunkard in the manner mentioned in said first section; except by the personal direction or on the written certificate of some physician, stating that such liquor is necessary for the preservation or recovery of the health of such drunkard, as prescribed in such second section.

§ 13. Where the parents or guardian of a minor under sixteen years of age, or the master of an apprentice or servant, have been designated by the overseers of the poor as habitual drunkards, no tavern-keeper, grocer or other person licensed to sell any strong or spirituous liquors or wines shall sell any such liquors or wines to any such minor, or apprentice, or servant, without the consent of the overseers of the poor in the city or town where such minor, or apprentice, or servant shall reside; and whoever shall offend against the provisions of this section shall forfeit the penalty prescribed by section seventeen of title nine of chapter twenty of the first part of the Revised Statutes, to be recovered by such overseers of the poor.

STATE INEBRIATE ASYLUM.*

Chap. 625 of the Laws of 1873.

AN ACT to reorganize the New York State Inebriate Asylum, and to provide for the better support and maintenance of the same.

PASSED May 27, 1873; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Within thirty days after the passage of this act, the Governor, by and with the consent of the Senate, shall appoint nine persons to be managers of the State Inebriate Asylum, three of whom shall hold their offices for one year from the fifteenth day of January, eighteen hundred and seventy-three, three for two years, and three for three years, as indicated by the Governor on making the appointment, and until others are appointed in their stead, subject to be removed at any time by the Senate, upon the recommendation of the Governor. Their successors shall be appointed by the Governor, by and with the advice and consent of the Senate, and shall hold their office for three years, and until others are appointed in their stead, and subject to be removed in the manner aforesaid. The term of office of the present trustees of said asylum shall terminate on the thirtieth day of June, eighteen hundred and seventy-three, after which the government of said asylum shall be vested in the board of managers appointed under this act, and their successors in office. The said trustees shall make out and file with the said managers, at the time aforesaid, a true and perfect inventory of all the property belonging to the asylum; and the managers shall receipt for and take possession of the same, and thereupon the trustees shall be relieved from liability for the care and custody of such property.

§ 2. Said board of managers shall have the general direction and control of all the property and concerns of the institution not otherwise provided for by law, and shall take charge of its general interests, and see that its designs be carried out, and every thing done faithfully according to the requirements of the Legislature and the by-laws, rules, and regulations of the asylum.

§ 3. The managers shall appoint a superintendent, who shall be an educated physician, and a treasurer, who shall reside in the city of Binghamton, and give bonds for the faithful performance of his trust, in such sum and with such sureties as the Comptroller of the State shall approve. They shall also appoint, upon the recommendation of the superintendent, a chaplain, a steward, an assistant physician, and other physicians as occasion may require, and a matron, all of whom, and the superintendent himself, shall constantly reside in the asylum, and shall be designated the resident officers thereof.

* Tit. 4, Chap. 20, Part 1, R. S., 6th ed., §§ 15-48.

§ 4. The managers shall, from time to time, determine the annual salaries and allowances of the treasurer and resident officers of the asylum, subject to the approval of the Comptroller, and such salaries and allowances shall not exceed in the aggregate six thousand dollars.

§ 5. The salaries of the treasurer and resident officers of the asylum shall be paid on the first day of each month in each year, by the Treasurer of the State, on the warrant of the Comptroller, to the treasurer of the asylum, on his presenting a bill of particulars signed by the steward and certified by the superintendent.

§ 6. The treasurer and resident officers of the asylum, before entering upon their respective duties, shall severally take the oath prescribed by the first section of the twelfth article of the Constitution of the State; and such oath shall be filed with the clerk of the county of Broome.

§ 7. The managers are hereby directed and empowered to establish such by-laws as they deem necessary and expedient for regulating the appointment and duties of officers, attendants and assistants; for fixing the conditions of admission, support, employment and discharge or expulsion of patients, and for conducting, in a proper manner, the business of the institution; also to ordain and enforce a suitable system of rules and regulations for the internal government, discipline and management of the asylum. They may take and hold in trust for the State any grant or devise of land, or any donation or bequest of money or other personal property, to be applied to the maintenance of patients and the general uses of the asylum. Any person who shall donate or leave by legacy the sum of five thousand dollars to the New York State Inebriate Asylum, may thereby establish forever a free bed in said asylum. Two thousand five hundred dollars shall provide a free bed in said asylum for six months in each year; twelve hundred and fifty dollars shall provide a free bed in said asylum for three months in each year. The donor or testator may name the patient who shall occupy the said free bed. But, in case the donor or testator shall fail to name a patient to occupy the free bed which said donor or testator shall have endowed, then the trustees of said asylum shall fill the said free bed with a poor patient. The said patients in said free beds shall be provided with medical treatment and board free of charge, and said patients shall be subject to the rules and regulations of said asylum. All legacies and donations given to the "New York State Inebriate Asylum," for the support of free beds in said asylum, shall be deposited with the Comptroller of the State of New York forever. The interest of said fund shall be sacredly applied and paid over to the board of trustees of said asylum, for the support of free beds, for which said fund provides.

§ 8. The superintendent shall be the chief executive officer of the asylum. He shall have the general superintendence of the buildings, grounds and farm, together with their furniture, fixtures and stock; and the direction and control of all persons therein, subject to the laws and regulations established by the managers. He shall daily ascertain the condition of all the patients and prescribe their treatment, in the manner directed in the by-laws. He shall also have power to appoint, with the managers' approval, such and so many

attendants and employees as he may think proper and necessary for the economical and efficient performance of the business of the asylum, and to prescribe their several duties and places, and to fix, with the managers' approval, their compensation, and to discharge any of them at his sole discretion; but in every case of discharge, he shall forthwith record the same, with the reasons, under an appropriate head, in one of the books of the asylum for the information, and subject to the approval of the board of managers. He shall also have the power to suspend, for good and sufficient cause, a resident officer; but in such case he shall forthwith give written notice of the fact, with the causes and circumstances, to one of the managers, whose duty thereupon shall be to call a special meeting of the board to provide for the exigency. He shall also, from time to time, give such orders and instructions as he may judge best calculated to insure good conduct, fidelity and economy in every department of labor and expense; and he is authorized and enjoined to maintain salutary discipline among all who are employed by the institution, and to enforce strict compliance with such instructions and uniform obedience to all the rules and regulations of the asylum. He shall further cause full and fair accounts and records of all his doings and of the entire business and operations of the institution, to be kept regularly from day to day, in books provided for that purpose, in the manner and to the extent prescribed in the by-laws; and he shall see that all such accounts and records are fully made up to the last day of December in each year, and that the principal facts and results, with his report thereon, be presented to the managers within three days thereafter. The assistant physician shall perform the duties and be subject to the responsibilities of the superintendent, in his sickness or absence.

§ 9. The managers shall keep in a bound book, to be provided for that purpose, a fair and full record of all their doings, which shall be open at all times to the inspection of the Governor of the State, and of all persons whom he or either house of the Legislature may appoint to examine the same.

§ 10. The managers shall maintain an effective inspection of the asylum, for which purpose one of them shall visit it every week; two once every month; a majority once every quarter, and the whole board once every year, at the times and in the manner prescribed in the by-laws. The visiting manager or managers shall note in a book kept for that purpose, the date of each visit, the condition of the buildings, surroundings and patients, with remarks of commendation or censure, and all the managers present shall sign the same. The general results of their inspection, with suitable hints, shall be inserted in their annual report, detailing the past year's operations and actual state of the asylum, which the managers shall make to the Legislature before the fifteenth day of the month of January, in each year, accompanied with the annual reports of the superintendent and treasurer of the asylum.

§ 11. It shall be the duty of the resident officers to admit any of the managers into every part of the asylum, and to exhibit to him or them on demand, all books, papers, accounts and writings belonging to the institution or pertaining to its business, management, discipline, or

government; also to furnish copies, abstracts and reports, whenever required by the managers.

§ 12. The treasurer shall have the custody of all moneys, bonds, notes, mortgages and other securities and obligations belonging to the asylum. He shall open with one of the banks in the city of Binghamton, to be selected with the approbation of the Comptroller of the State, an account in his own name as treasurer of the asylum, and he shall deposit all moneys, immediately upon receiving them, in said bank; and shall draw for the same only for the uses of the asylum, and in the manner prescribed in the by-laws, upon the written order of the steward, specifying the object of the payment. He shall keep full and accurate accounts of receipts and payments, and in the manner directed in the by-laws, and such other accounts as the managers shall prescribe. He shall balance all of the accounts on his books annually, on the last day of December, and make a statement of the balance therein, and an abstract of the receipts and payments of the past year, which he shall, in three days thereafter, deliver to the auditing committee of the managers, who shall compare the same with his books and vouchers, and verify the results by a further comparison with the books of the steward, and certify the correctness thereof, within the next five days, to the managers. He shall also render a quarterly statement of his receipts and payments, on the last day of March, June and September, in each year, to the auditing committee, who shall compare and verify the same as aforesaid, and report the results duly certified to the managers, who shall cause the same to be entered in one of the books of the asylum. He shall further render an account of the state of his books, and of the funds and other property of the asylum in his custody whenever required to do so by the managers.

§ 13. The treasurer of the asylum shall be vested with the same powers, rights and authority which are now by law given, either to the superintendents of the poor, or to the overseers of the poor, in any county or town of the State, so far as may be necessary for the indemnity and benefit of the asylum, and for the purpose of compelling a patient, or a relative, or a committee liable for his maintenance, to defray the expense of his support in the asylum, and reimburse actual disbursements for his necessary clothing and traveling expenses, according to the by-laws of the institution; also for the purpose of coercing the payment of similar charges when due, according to said by-laws, from any town, or city or county that is liable for the support of any inebriate in said asylum.

§ 14. Said treasurer is also authorized to recover, for the uses of the asylum, any and all sums which may be due upon any note or bond in his hands, belonging to the asylum; also any and all sums which may be charged and due, according to the by-laws of the asylum, for the support of any patient, or for actual disbursements made on his behalf, for necessary clothing and traveling expenses, in an action to be brought in said treasurer's name, as treasurer of the State Inebriate Asylum, and which shall not abate by his death or removal, against the individual, town, city or county legally liable for the maintenance of said patient, and having neglected to pay the same when demanded by the treasurer, in which action judgment shall be rendered for such

sum as shall be found due, with interest from the time of the demand aforesaid. Said treasurer may, also, upon the receipt of the money due upon any mortgage in his hands, belonging to the asylum, execute a release, and acknowledge full satisfaction thereof, so that the same may be discharged of record.

§ 15. The steward, under the direction of the superintendent, shall make all purchases for the asylum, and preserve the original bills and receipts thereof, and keep full and accurate accounts of the same, and copies of all orders drawn by himself on the treasurer; he shall, also, under like direction, make contracts in the superintendent's name, with the attendants and employees, and keep and settle their accounts; he shall also keep the accounts for the support of patients and expenses incurred in their behalf, and furnish the treasurer every month with copies of such as fall due; he shall make quarterly abstracts of his accounts to the last day of March, June, September and December in each year, for the treasurer and manager; he shall also be accountable for the careful keeping and economical use of all furniture, stores and other articles provided for the asylum, and shall annually, during the first week in January, make out and file with the managers a true and perfect inventory, verified by oath, of all the personal property belonging to the asylum, in and about the premises, with an appraisal thereof, made under oath by himself and some discreet householder of the city of Binghamton, whom the managers shall appoint for that purpose.

§ 16. As soon as practicable, after entering upon their duties, the managers shall ascertain the number of patients the asylum will properly accommodate, and shall designate in a just and equitable manner, with the approval of the board of State Commissioners of Public Charities,* the number of patients each county may be entitled to send to the institution. They shall cause notice thereof to be published for two weeks in the State paper, and sent to the clerk of every county, who shall transmit copies of the same to the county judge, and to the superintendents of the poor of said county, by mail. A circular from the superintendent of the asylum shall accompany said notice to each county clerk, and to the county judge and superintendents of the poor, stating the respective quotas of patients each county may be entitled to send to the asylum, and giving all necessary directions respecting admission and support, according to the by-laws. Upon the completion of the present buildings, and in the event of the erection of other buildings for the purposes of the institution, the managers shall apportion the room thus provided for patients among the several counties in the manner above stated, and shall cause notice thereof to be promulgated as herein provided.

§ 17. The county superintendents of the poor of the several counties may make application in behalf of any inebriate, in indigent circumstances, to the county judge of the county where he resides, and said judge shall call two respectable physicians, and other credible witnesses, and fully investigate the facts of the case, and either with or without the verdict of jury, at his discretion, as to his being

* Now designated as the State Board of Charities by chap. 571, Laws of 1873.

an inebriate, shall decide the case as to his indigence. And if the judge certifies that satisfactory proof has been adduced, showing him to be an inebriate, and his estate is insufficient to support him and his family (or if he has no family, himself), and that he would probably reform under treatment therein, on his certificate authenticated by the county clerk and seal of the County Courts, he shall be admitted into the asylum, and supported there at the expense of said county until he shall be reformed, if such reformation is probably to be effected in one year. The judge in such case shall have requisite power to compel the attendance of witnesses and jurors, and shall file the certificate of the physicians taken under oath, and other papers, with a report of his proceedings and decision, with the clerk of the county, and report the facts to the supervisors, whose duty it shall be, at their next annual meeting, to raise the money requisite to meet the expense of support accordingly. In counties having no superintendents of the poor, application may be made by the overseer of the poor of any town or city in said county, or other officer charged with the support and relief of indigent persons, and the same proceedings may be conducted, and the inebriate sent to the asylum, as if the application had been made by a county superintendent. In case, however, of persistent indulgence by said inebriate, or of constant disregard of the rules and by-laws of the asylum, or from any other cause or circumstance rendering his case hopeless or incurable, he may be returned to the county from where he came, at the discretion of the superintendent appointed by the managers.

§ 18. Whenever there are vacancies in the asylum the managers may authorize the superintendent to admit under special agreements such private patients as may seek admission, who, in his opinion, promise reformation, but preference in all cases shall be given to citizens of this State ; or, he may receive public patients from counties in excess of their quotas.

§ 19. The price to be paid for keeping any person in indigent circumstances in the asylum shall be annually fixed by the managers so it shall not exceed the actual cost of support and attendance, exclusive of officers' salaries. The managers may, at their discretion, require payments to be made quarterly or semi-annually in advance.

§ 20. The expense of clothing and maintaining, in the asylum, a patient who has been sent upon the order of any county judge, shall be paid by the county from which he was sent to the asylum. The treasurer of said county is authorized and directed to pay to the treasurer of the asylum the bills for such clothing and maintenance, as they shall become due and payable, according to the by-laws of the asylum, upon the order of the steward ; and the supervisors of said county shall annually levy and raise the amount of such bills and such further sums as will probably cover all similar bills for one year in advance. Said county, however, shall have the right to require any town or city, that is legally liable for the support of such patient, to reimburse the amount of said bills, with interest from the day of paying the same.

§ 21. Whenever the managers shall order an indigent person removed from the asylum to the county whence he came, the superintendent of the poor of said county shall audit and pay the actual

expense of such removal as part of the contingent expenses for the care of the poor of said county. But if any town or city be legally liable for the support of such patient, the amount of such expense may be recovered for the use of the county, by such superintendent. If such superintendent of the poor neglect or refuse to pay such expense on demand, the treasurer of the asylum may pay the same and charge the amount to the said county, and the treasurer of the said county is authorized to pay the same with interest, after thirty days; and the supervisors of said county shall levy and raise the amount as other county charges.

§ 22. The managers of the State Inebriate Asylum shall receive no compensation for their time or services, but shall receive their actual and necessary traveling and other expenses, to be paid by the State Treasurer, on the warrant of the Comptroller, on the rendering of their accounts.

§ 23. All purchases for the use of the asylum shall be made for cash, and not on credit or time, and the managers shall make all needful rules and regulations to enforce the provisions of this section.

§ 24. The term "inebriate," as used in this act, is applied to "an habitual or periodical drunkard;" the word "oath" includes affirmation; the word "county superintendent" means "superintendent of the poor;" the word "asylum" and "institution" means "State Inebriate Asylum;" a word denoting the singular number is to include one or many; and every word importing the masculine gender only, may extend to and include females.

§ 25. This act shall take effect on the first day of July, eighteen hundred and seventy-three, except so far as it relates to the appointment of the managers of the asylum, which shall take effect immediately.*

*Additional sections applying to this act.**

§ 40. The board of trustees of the New York State Inebriate Asylum are hereby authorized to appoint two or more of the attendants and employees of said asylum as policemen, whose duty it shall be, under the order of the superintendent or assistant superintendents, to arrest and return to the asylum such inebriates who have been sent to the asylum by the order of the court, and who have escaped from the asylum, or to arrest any patient who shall violate any law of the asylum.

§ 41. No person shall sell any strong or spirituous liquors or wines, or fermented liquors, within the distance of one-half mile from the outward bounds of the lands and premises of the New York State Inebriate Asylum, situate in the towns of Binghamton and Kirkwood, in Broome county.

§ 42. Whoever shall sell any strong or spirituous liquors or wines, or fermented liquors, within the distance of one-half mile from the outward bounds of the said lands and premises, shall forfeit fifty dollars for each offense, and shall also be guilty of a misdemeanor.

*It will be noticed that the foregoing act contains no repealing clause. It leaves, therefore, in force all preceding acts that are not in direct conflict with its provisions.

§ 43. No person shall enter in any manner or pass upon the said lands and premises of the New York State Inebriate Asylum, other than the officers of said asylum, officers of justice, and those having business with said asylum, without a written or printed permit or pass, to be issued by the officer or officers of said asylum, designated in conformity with such by-laws as said asylum may pass; and any person violating the provisions of this section shall forfeit the sum of ten dollars, and shall be guilty of a misdemeanor.

§ *46. Whoever shall sell or give away any strong or spirituous liquors, or wines or fermented liquors, or opium or tobacco, to any patient belonging to the New York State Inebriate Asylum shall forfeit fifty dollars for each offense, and shall also be guilty of a misdemeanor.

§ 47. All penalties imposed by this act shall be sued for and recovered in the name of the president of the New York State Inebriate Asylum, and shall be paid into the State treasury.

§ 48. Any justice of the Supreme Court, or the county judge of the county in which any inebriate may reside, shall have power to commit such inebriate to the New York State Inebriate Asylum, upon the production and filing of an affidavit or affidavits by two respectable practicing physicians and two respectable citizens, freeholders of such county, to the effect that such inebriate is lost to self-control, unable, from such inebriation, to attend to business, or is thereby dangerous to remain at large. But such commitment shall be only until the examination now provided by law shall have been held, and in no case for a longer period than one year.¹ (§ 4, *ch.* 266, 1865.)

1. This section was held to be unconstitutional in *Ex parte Janes* (30 *How. Pr.* 446, A. D. 1866), for the reason that it authorizes the commitment for the term of one year of persons as inebriates and lost to self-control, to the asylum, upon *ex parte* affidavits, without any provision for an examination, on their own motion, as to whether they were, or are such inebriates, before some court or officer and a jury, when they could be heard in opposition to the charge made. The decision was made at chambers upon a *habeas corpus*, issued in behalf of the petitioner Janes, then a patient confined in the asylum.

§ 49. Said institution shall have power to receive and retain all inebriates who enter said asylum either voluntarily or by the order of the committee of any habitual drunkard. All poor and destitute inebriates who are received into said asylum shall be employed in some useful occupation in or about the said asylum; said inebriates shall have all moneys accruing from their labor, after the expenses of their support in said asylum shall have been paid, which shall be sent to their

¹ 2 R. S., 6th Ed., p. 884 — §§ 44 and 45, although printed therein, are superseded, and have been here omitted.

families, monthly ; if said inebriates have no families, it shall be paid to him or her at their discharge from said institution.¹ (§ 9, *ch.* 184, 1857.)

1. Although this section is not included in the sixth edition of the Revised Statutes, it is still in force.

§ 50. The board of trustees of the New York State Inebriate Asylum are hereby authorized to appoint two or more of the attendants and employees of said asylum as policemen, whose duty it shall be, under the order of the superintendent or assistant superintendents, to arrest and return to the asylum such inebriates who have been sent to the asylum by the order of the court, and who have escaped from the asylum, or to arrest any patient who shall violate any law of the asylum. (§ 1, *ch.* 673, 1866.)

§ 51. The committee of the person of any habitual drunkard, duly appointed under existing laws, may, in his or their discretion, commit such habitual drunkard to the custody of the trustees or other proper officers of said asylum, there to remain until he shall be discharged therefrom by such committee.¹ (§ 10, *same ch.*)

1. This section, although not included in the 6th edition of the Revised Statutes, has never yet been repealed. It is fully in harmony with the doctrine laid down in the *Matter of Hoag* (7 *Paige*, 312). See page 54.

INEBRIATES' HOME FOR KINGS COUNTY.*

Chap. 169 of the Laws of 1877.

AN ACT to provide means for the support of the Inebriates' Home for Kings county, and for the government of the said home, and to amend the several acts relating thereto, passed May ninth, eighteen hundred and sixty-seven, April thirtieth, eighteen hundred and sixty-eight, May fourteenth, eighteen hundred and seventy-two, and June twenty-first, eighteen hundred and seventy-five.

PASSED April 20, 1877.

SECTION 1. Section one of the act entitled "An act to incorporate the Inebriates' Home for Kings county," passed May ninth, eighteen hundred and sixty-seven, is hereby further amended so as to read as follows :

* This statute, although, by strict construction of its title, intended to operate for Kings county alone, is now, by the amendment added by chap. 169 of 1877, § 6, made of general application throughout the State. It has been so often amended as to be confusing in its sections when looked for according to original numbers. A new enumeration has consequently been made in the present compilation to harmonize with the 6th edition of the Revised Statutes, where it is included in Tit. 4, Ch. 20, Part 1, §§ 49-75.

§ 1. Such of the following named persons as shall severally and respectively duly qualify themselves in the manner and within the time required by this act are hereby constituted the incorporators of the Inebriates' Home for Kings county, in lieu of the present incorporators thereof, namely : James S. T. Stranahan, Samuel A. Avila, Joseph W. Richardson, Andrew Walsh, William M. Thomas, John H. O'Rourke, Charles W. Church, Frederick S. Massey, George G. Herman, Theodore L. Mason, Michael E. Finnegan, Cornelius Ferguson, Harmon V. Storms, Adolphus Gubner, Peter Milne, Junior, James H. Prentice, John Willett.

§ 2. It shall be the duty of the incorporators hereby appointed, within ten days after the passage of this act, and before entering upon their duties, to qualify, by taking the constitutional oath of office and filing the same in the office of the clerk of Kings county, and none of them who shall fail so to qualify within the time herein prescribed shall possess or exercise any of the powers or duties pertaining to such corporation.

§ 3. The said corporation shall have power to receive and retain all inebriates who enter said home either voluntarily or by order of the executive committee, as hereinafter provided, for such period as said trustees may deem for the benefit of such inebriates, not exceeding six months.

§ 4. It shall have power to establish and carry on such branches of industry as the trustees thereof may deem necessary to carry out the reformatory objects for which it is established, and may take, purchase, hold and dispose of such personal property as may be necessary for that purpose, and no other. In its corporate name, to take, purchase and hold real estate in the county of Kings, and erect thereon such building or buildings as the said trustees may deem proper and necessary to carry out the object of said incorporation, and for no other object. Said corporation shall have power to sue and be sued, to make and use a common seal and alter the same at pleasure ; to take and hold any grant or devise of lands or any donation or bequest of money or other personal property, to be applied to the founding and maintenance of said institution.

§ 5. The justices of the Supreme Court of the State of New York, in the exercise of their several jurisdictions, and the county judges of the several counties of this State, within the limits of their several jurisdictions, shall have power to commit to said Inebriate Home for Kings county for a term not exceeding one year all persons who, in accordance with the provisions of sections 4, 5 and 6 of this act, as amended, shall be found to be incapable or unfit to properly conduct their own affairs, or dangerous to themselves or others in consequence of habitual drunkenness, on the presentation to the justice or county judge making such commitment of an agreement on the part of the executive committee of said home, certified by the chairman thereof, to receive and treat such habitual drunkard in said home, and not otherwise.

1. Laws of 1867, ch. 843, § 3 ; amended by chap. 483 of 1868, and chap. 797 of 1873.

§ 6. Such commitment shall be made by any of said justices, in any case where the facts referred to in the last preceding section of this act shall be made to appear by petition or complaint, duly verified and presented by any relative of such habitual drunkard, or by any officer of said home, or any constable or officer of police doing duty within any county, town or city of this State, and upon return of a commission issued upon such petition or complaint.

§ 7. Upon the presentation of such petition or complaint, the justice to whom the same shall be presented, shall proceed thereupon in the same manner as is directed in title two of chapter five of part two of the Revised Statutes of the State of New York, in relation to the care and custody of the persons and estates of idiots, lunatics, persons of unsound mind, and drunkards, and according to the rules and practice of the Supreme Court in such cases. (§ 5, *same ch.*)

§ 8. Upon becoming satisfied by return of a commission, as heretofore provided, that any person is an habitual drunkard, and incapable, in consequence thereof, of conducting his or her own affairs, said justice shall have power, in his discretion, to issue his warrant, committing the person so found to be an habitual drunkard to the custody of the said home, to be detained in the said home for such period, not exceeding one year, as the said justice may deem proper, and such warrant shall be executed by any constable or officer of police doing duty within any county, town or city of this State. Any such warrant, duly issued, shall be full and sufficient justification for all acts done by any properly authorized officer, under and in accordance therewith. Such order of commitment may at any time be vacated or modified by any justice of the Supreme Court, on cause shown.

§ 9. Any justice before whom proceedings may be pending, under the provisions of this act, may, after filing of any complaint, and when in his judgment the circumstances of the case render it proper to do so, commit the person charged with being an habitual drunkard to the said home, while proceedings on such complaint are pending, and all persons so temporarily committed shall be discharged from said home, if, on return of a commission, it shall be determined that they are not proper persons to be detained.

§ 10. The estate of any person committed to such home, and the person committed, shall be liable for the support of such person therein, and the committee of every such person shall pay out of his estate such reasonable and proper sum as shall be fixed by the justice ordering the commitment.

§ 11. In the erection of the buildings provided for in the first section of this act, suitable and proper provision shall be made for keeping those who may enter said home voluntarily, separate and apart from those who may be transferred to said home from the jail or penitentiary. Suitable provision shall also be made for keeping the sexes separate and apart. There shall be provided, also, a suitable chapel for religious services, which shall be equally free to all religious denominations. (§ 9, *ch.* 483, 1868.)

§ 12. The treasurer of the board of excise in and for the metropolitan police district of the State of New York shall pay to the treasurer of the said Inebriates' Home the sum of two hundred thousand dollars of the first moneys hereafter received by said board of excise

for licenses granted under said excise law to persons carrying on business in the county of Kings, which amount is hereby appropriated to said home, to be applied to the erection and furnishing of suitable buildings for the same, and improving the grounds belonging thereto, and no other purpose. After the payment to said home of the said sum of two hundred thousand dollars the treasurer of said board of excise shall pay annually, thereafter, to the treasurer of said home the sum of ten thousand dollars out of the excise moneys, as aforesaid, to be applied to the maintenance of the same and for no other purpose. All fines hereafter collected for violations of said excise law, in the county of Kings, shall be paid to the treasurer of said home in the manner hereinafter stated.¹ The justices of the peace of the city of Brooklyn, and police justices in the towns in Kings county, are hereby required to pay to the treasurer of said home, quarter-yearly, all moneys received by them for violations of any of the provisions of this act. Such payment shall be accompanied by a detailed statement showing the separate amounts received by them, from whom received, the date when received, and the residence of the party, so far as the same can be ascertained by his examination, and that of the officer making the arrest, which statement shall be verified by the oath of the justice. Any person failing to comply with the provisions of this act shall be guilty of a misdemeanor.¹

1. Amended. See § 22.

§ 13. The said executive committee shall have power to visit the persons confined in the jail or penitentiary of Kings county for intoxication or habitual drunkenness, as often and at such times as they may deem advisable; and may determine from time to time who of the persons so confined in said institutions are fit and proper subjects to be transferred to said Inebriates' Home. Whenever said executive committee shall determine, pursuant to their by-laws, that any such person is a fit and proper subject to be so transferred, the president of said Inebriates' Home shall make out and sign a certificate stating the fact that said executive committee have determined that such person is a fit and proper person to be so transferred, and directing the keeper of said jail or penitentiary to deliver such person to the keeper of said home, which certificate shall be filed with such keeper. Upon receiving such certificate the keeper shall forthwith transfer such person to said home, there to be detained pursuant to the first section of this act.

§ 14. For the purpose of carrying out the object of said Inebriates' Home, the magistrates in Kings county shall hereafter commit persons convicted for intoxication, or as habitual drunkards, to the jail or penitentiary for a period not exceeding six months in case of the commitment of such person; and the persons so committed for intoxication, unless transferred as hereinafter provided, shall be discharged by the keeper of the jail or penitentiary at the expiration of ten days from their commitment; and the persons so transferred, shall be so discharged at the expiration of thirty days from their commitment. For the further purpose of carrying out the object of said Inebriates' Home for Kings county, the magistrates of the several counties of this

State, upon presentation to them of a requisition from the nearest relative or relatives, guardian or friend of any person who has been duly committed to the jail or other prison within their respective jurisdictions as an habitual drunkard, together with a certificate from the chairman of the executive committee, stating that such committee is willing to admit and retain in custody such person so committed as an habitual drunkard, may so modify such order of commitment, as to permit any authorized agent of said home to take charge of said habitual drunkard and transfer him or her directly to said institution, there to be detained pursuant to the provisions of the second section of the act of incorporation of said home, passed May 9th, 1867, provided always that the relatives, guardians or friends shall alone be liable for the expenses of his or her removal to and maintenance in said home.

§ 15. Such portion of the money, not less than seventy-five thousand dollars, appropriated by section four of said act, to be applied to the erection and furnishing suitable buildings for said home, and improving the grounds belonging thereto, as may be deemed necessary by the executive committee of said home for the purposes aforesaid, shall be expended by said executive committee, a majority of whom shall approve of all plans, specifications and contracts relating to the erection of said buildings and improving said grounds, at a regular meeting of the committee or a special meeting thereof, of which a written notice specifying the object of said special meeting shall be given to each member of said committee at least three days before such meeting, and all plans, specifications and contracts, before they shall be finally accepted, shall be submitted to the directors of said home and be sanctioned by them at a regular meeting or a special meeting duly called for that purpose.

§ 16. The balance of the money appropriated by the section hereby amended, and the money arising from the sale of lands herein authorized to be sold, after paying the incumbrances thereon, may be expended and used either wholly and in part for the purpose of maintaining said home, and in the erection, improvement and furnishing of suitable buildings therefor, or invested in securities, and the income thereof used for said purposes, to such extent and in such manner as the corporation thereof shall from time to time deem necessary and proper.¹

1. As amended by chap. 169, Laws of 1877, § 3.

§ 17. The president of said home shall, in the month of January in each year, report to the Legislature the doings of said home for the preceding year, which report shall state the amount of money received and on hand, the sources from whence received, the amount expended and for what expended, the number received into and discharged therefrom, together with such other information as may be deemed of general interest.

§ 18. Said corporation is hereby authorized to grant, sell, alien, remise, release and convey such portions of the real estate now owned by said corporation, as they may deem for the best interest of said home.

§ 19. The estate, both real and personal, of said home shall be exempt from taxation.

§ 20. For the safe management and discipline of the Inebriates' Home for Kings county, the executive committee are hereby authorized to appoint two or more of the attendants or employees of said home as policemen, whose duty it shall be, under the order of the superintendent, assistant superintendent or executive committee of said home to arrest and return to the home such inebriates as may have escaped therefrom, or to arrest any patient who shall become disorderly, or violate any law of the home ; but no policeman appointed under this act shall exercise any powers except as hereby provided.

§ 21. The comptroller of the city of Brooklyn shall pay to the treasurer of the Inebriates' Home for Kings county, fifteen per cent of all moneys received by him after the first day of April, eighteen hundred and seventy-seven, from the excise commissioners of the city of Brooklyn for licenses granted by them under the excise laws of the State, and the boards of commissioners of excise of the towns of Kings county shall also pay to the treasurer of said home fifteen per cent of all moneys received after date for licenses granted by them. Said money shall be paid to the said treasurer upon the presentation of a certified copy of a resolution passed by the executive committee of said home declaring that it is necessary for the care and maintenance of the indigent poor treated therein, and as much of said fifteen per cent only shall be paid to said treasurer as shall be certified by such resolution to be required for such support, and the payment of the legitimate claims on said home for the care and support of said indigent poor. The moneys herein required to be paid shall be so paid by the said comptroller and by the boards of excise of said towns within thirty days after the receipt thereof, or as soon after the expiration of said thirty days as the same shall be called for by resolution as aforesaid, and shall be applied to the care and treatment in said home of such persons, actual residents of the county of Kings, as in the judgment of said executive committee may be poor and in such indigent circumstances as to require relief and support, and be proper subjects for care and treatment therein by reason of habitual drunkenness.¹

1. As amended by chap. 169, Laws of 1877.

§ 22. Section two of said act¹ is hereby repealed, and hereafter all fines collected for violations of the excise law and for intoxication, in the city of Brooklyn, shall be paid to the treasurer of said city; and all such fines collected by any officer in the county towns of said county shall be paid to the treasurer of said county.

1. The original act, chap. 687 of 1872.

§ 23. Any magistrate of the city of Brooklyn or of the county of Kings by or before whom any legal resident of said county shall be convicted as an habitual drunkard, and adjudged to be indigent and without means of support, and thereupon committed or sentenced to be committed according to law to one of the prisons of said county, may, upon presentation of a certificate from the chairman of the executive committee of said home, stating that such person is a proper

subject for treatment in said home, so modify and change the order of commitment or sentence as to transfer and commit said habitual drunkard to said home, there to be detained during the period of said commitment.¹

1. As amended by chap. 169, Laws of 1877, § 5.

§ 24. Any person so transferred to the home by such order of a magistrate, who shall escape from the institution, or who shall, by reason of insubordination, or other improper conduct prove, in the judgment of the house committee of said home, that said person is an improper subject for care and treatment in said home, shall at once be removed to the prison to which he or she was originally committed ; and the keeper of such prison shall take into his custody and retain such person during the balance of the period for which said person was originally committed, on the receipt of a certificate from the house committee of said home, signed by the chairman of said committee, together with the magistrate's original commitment to prison.

§ 25. Any magistrate within this State, upon the production of a certificate from the chairman of the executive committee as aforesaid, may commit any person convicted before him as an habitual drunkard to the custody of said home for a term not exceeding six months, unless such person, at the time of conviction, is proved to have been convicted of said offense twice previously in this State, within two years then next preceding, in which case he shall be so committed for a term not less than nine nor exceeding twelve months ; and, in either case, if he shall be an indigent poor person and so adjudged and determined by the magistrate, the county from which he or she may be committed, or the city or town, in cases where the poor are a charge upon said city or town, shall be liable for and shall pay to the treasurer of said home the sum of five dollars per week, as board, for each and every week that such person shall remain in the custody of said home under said commitment.¹

1. New section added in chap. 169, Laws of 1877.

§ 26. In the construction of the provisions of the several acts constituting the charter of the Inebriates' Home for Kings county, the term "habitual drunkard" shall apply to all persons who, either by reason of habits of periodical, frequent, or constant drunkenness, induced either by the use of alcoholic or vinous or other liquors, or opium, or other narcotic or intoxicating or stupefying substances shall, on trial and conviction, be found to be incapable or unfit to properly conduct their own affairs, or to be dangerous to themselves or others, or to neglect or fail to support themselves or those legally chargeable to them for maintenance.

§ 27. The provisions contained in title three of chapter three of part four and sections one hundred and seventy-five, one hundred and seventy-six and one hundred and seventy-seven of the Revised Statutes of the State of New York, shall apply to the Inebriates' Home for Kings county, together with the provisions contained in title nine of chapter twenty of part one and section twenty-one of said Revised

Statutes, and the superintendent of said home shall be held to be the legal guardian of every inmate thereof, during his or her residence therein, so far as the provisions of the last-named section are concerned.

§ 28. The more perfectly to carry into effect the objects of said Inebriates' Home, the members of the corporation shall, at the annual meeting in May next, elect from their number by ballot, fifteen persons who shall constitute a board of directors of said corporation; and the persons so elected shall hold their offices as hereinafter provided, and until others shall be elected in their places; and in case of any vacancy in said board by resignation, removal from the county, or otherwise, the remainder of said directors shall have power to fill such vacancies. The directors, as soon as convenient, and not later than their first regular meeting after their election, shall divide themselves into three classes of five members each, and proceed to decide by lot their relative terms of service, for one, two and three years, as the terms of service of each class so arranged shall expire. At each annual meeting of the corporation their successors shall be chosen by ballot; and the term of service of the persons so chosen shall be the three years next ensuing such election.

NEW YORK COUNTY INEBRIATE ASYLUM.*

This statute, being strictly *in pari materia* with the two foregoing, although restricted in its application to New York county alone, it has seemed best to include it under its proper subject-matter with the others rather than to place it among special acts of a purely local character. It is now included in Title 4 of Chap. 20 of Part 1 of the Revised Statutes, 6th edition, §§ 76-87.

SECTION 1. The Commissioners of Public Charities and Correction are hereby authorized and empowered to erect, establish and furnish upon the land belonging to the city of New York, now under the control of said commissioners, a building or buildings to be known as the Asylum for Inebriates, and to build and construct all such appurtenances thereto, as in the judgment of said Commissioners may be necessary and proper. The said Commissioners are also authorized and empowered to appoint and employ all such physicians, surgeons, officers and attendants as may be necessary and proper for the management and direction of said asylum, and the care of the inmates thereof, and to fix the compensation of such employees, in the same manner and with the same power as in respect to the persons employed in the institution heretofore placed under the control of said Commissioners. (§ 1, *ch. 141*, 1864.)

§ 2. The necessary expense of erecting and constructing such asylum and its appurtenances, and of maintaining the same, shall be

* An act to establish an Asylum for Inebriates in the city of New York, and to provide for the government thereof. Passed April 8, 1864.

provided for in the same manner as the expenses of the other institutions heretofore placed under the control of the said Commissioners; and said Commissioners are hereby authorized to receive from the board of excise, from time to time, twelve per cent of the aggregate amount of moneys received in each and every year by said board of excise, from and after April first, eighteen hundred and sixty-seven, for license fees received for licenses granted in the city and county of New York; and said board, upon application of the said Commissioners, are hereby authorized and directed to pay over, from time to time, to said Commissioners such percentage, which moneys shall be strictly applied by said Commissioners to the building, maintenance and support of said asylum, and duly accounted for in their annual report.* But nothing in this act contained shall be construed to divert from the State Inebriate Asylum, or interfere with the proportion of said license fees set apart for said institution by existing laws. The said Commissioners are authorized to demand and receive all fines imposed for intoxication or disorderly conduct in the city of New York, which fines, without any deduction, shall be paid over monthly by the magistrate, clerk or other person who receives the same, to the said Commissioners, and shall be by them applied and accounted for as other moneys received by virtue of this act. (§ 2, *ch.* 141, 1864; *as amended by ch.* 470, 1867.)

§ 3. The said Commissioners shall make all needful rules and regulations for the government of said asylum, and shall provide for the proper support and maintenance of the inmates thereof, and especially for such medical treatment as will be effectual for, or tend to, the curing of such inmates of the habits of inebriety and diseases induced thereby, and they shall have full power and authority to regulate and control the inmates of said asylum, and to establish such provisions for moral and sanitary discipline as they may deem expedient. (§ 3, *ch.* 141, 1864.)

§ 48. The justices of the Supreme Court, in the exercise of their jurisdiction within the city of New York, the justices of the Superior Court of said city, and the judges of the Court of Common Pleas in and for the county of New York, shall have power to commit to the said Inebriate Asylum, for a term not to exceed two years, all persons who, being actual inhabitants of the said city, shall be incapable or unfit for properly conducting their own affairs, in consequence of habitual drunkenness. (§ 4, *same ch.*)

§ 49. Such commitment shall be made by any of said justices or judges, in any case where the facts referred to in the last preceding section of this act, shall be made to appear by petition or complaint duly verified and presented by any relative of such habitual drunkard, or by the Commissioners of Public Charities and Correction, or any officer of the metropolitan police doing duty within said city, and upon return of a commission issued upon such petition or complaint. (§ 5, *same ch.*)

§ 50. Upon the presentation of such petition or complaint, the justice or judge to whom the same shall be presented, shall proceed thereupon in the same manner as is directed in title two of chapter

* Chap. 175, Laws of 1870, § 7; chap. 383, Laws of 1870, § 48.

five of part two of the Revised Statutes of the State of New York, in relation to the care and custody of the persons and estates of idiots, lunatics, persons of unsound mind and drunkards, and according to the rules and practice of the Supreme Court in such cases. (§ 6, *same ch.*)

§ 704. Upon becoming satisfied by return of a commission as heretofore provided, that any person is an habitual drunkard and incapable, in consequence thereof, of conducting his or her own affairs, said justice or judge shall have power, in his discretion, to issue his warrant, committing the person so found to be an habitual drunkard, to the custody of the said Commissioners of Public Charities and Corrections, to be detained in the said asylum for such period, not exceeding two years, as the said justice or judge may deem proper, and such warrant shall be executed by any member of the metropolitan police, upon the request of said Commissioners or one of them. Any such warrant, duly issued, shall be full and sufficient justification for all acts done, by any properly authorized officer, under and in accordance therewith. (§ 7, *same ch.*)

§ 705. Any justice or judge before whom proceedings may be pending under the provisions of this act may, after filing of any complaint, and when in his judgment the circumstances of the case render it proper so to do, commit the person charged with being an habitual drunkard to the said asylum while proceedings on such complaint are pending, and all persons so temporarily committed shall be discharged from said asylum, if, on return of a commission, it shall be determined that they are not proper persons to be detained. (§ 8, *same ch.*)

§ 706. The estate of any person committed to such asylum, and the person committed, shall be liable for the support of such person therein, and the committee of every such person shall pay out of his estate such reasonable and proper sum as shall be fixed by the justice or judge ordering the commitment. The said Commissioners of Public Charities and Correction shall have authority to bring and maintain actions, in any court of competent jurisdiction, against the committee or guardians of the estate of any person committed to said asylum as aforesaid, or against any person so committed, for the support and maintenance of such person while in said asylum. Such actions may be brought by said Commissioners in the name of the "Board of Commissioners of Public Charities and Correction;" but all recoveries had in such actions shall enure to the city of New York, and all amounts collected thereon shall be received by said Commissioners, and accounted for in the same manner as all other moneys which they are by law authorized to receive. (§ 9, *ch. 141, 1864.*)

§ 54. It shall be lawful for the said Commissioners of Charities and Correction to transfer from the alms-house and work-house under their control, to said Inebriate Asylum, any persons committed to the alms-house or work-house, who, in the judgment of said Commissioners, shall be fit and proper subjects for the said asylum, and in their discretion to return such persons to the alms-house or work-house; provided, however, that no person shall by reason of such transfer be restrained of his liberty for a longer term than required by his original sentence or commitment. (§ 10, *same ch.*)

§ 55. Any person committed to the said asylum, by order of any justice or judge as heretofore provided, may be discharged therefrom at any time before the expiration of the time for which such person was committed, upon the order of any justice or judge having jurisdiction as herein provided, upon such justice or judge being satisfied that such person is cured and fit to be released. Application for such discharge may be made by any person, provided, however, that previous notice of such application shall be given in writing to the said Commissioners of Public Charities and Corrections. Upon any such application being made, the justice or judge receiving the same shall proceed in the same manner as upon writs of *habeas corpus*. (§ 11, *same ch.*)

§ 56. The said Commissioners shall have authority, at any time, to discharge from said asylum any person committed thereto, for the following causes, viz. :

1. That such person is cured.
2. That such person is incurable, and incapable of being permanently benefited by the treatment and discipline of said asylum.
3. That such person has failed to pay for his support therein, or has been guilty of vicious conduct, prejudicial to the good order and discipline of the institution. (§ 12, *same ch.*)

CHAPTER FIFTH.

SPECIAL ACTS RELATING TO COUNTIES.

NEW YORK COUNTY.

It appears from authentic records that the first public hospital or asylum in the State of New York, in which the insane received special medical treatment, was the New York City Hospital. This institution was incorporated by royal charter bearing date June 13th, 1771, and a building in pursuance of its objects was begun in 1773, which, unfortunately, was destroyed by fire before completion. The intervention of the Revolutionary war, bringing with it the usual financial embarrassments, delayed the progress of the work of construction, so that, despite pecuniary aid received from the colonial Legislature, the edifice was not opened until January, 1791. It was then opened as a general hospital, receiving all cases of disease indiscriminately. In this way cases of insanity gradually found their way into it. The exact date of the reception of the first case cannot now be ascertained, although two are reported as admitted in May, 1797.* Hitherto lunatics had been legally classified among disorderly persons (*chap. 31, Laws of 1788*) and were to be disposed of according to the pleasure of the magistrates before whom they were brought, either by being confined, if belonging to any place within the limits of their jurisdiction, or if strangers, then to be returned to their last legal place of settlement.†

* History of the Bloomingdale Asylum for the Insane, by. Pliny Earle, N. Y., 1848, p. 8.

† This statute was an almost identical re-enactment of the 17th Geo. 2nd, ch. 5, which authorized any two justices to cause pauper lunatics to be apprehended and to be locked up in some secure place and there chained, and if the pauper's settlement should prove to be in another parish, then he was to be forwarded thither and there chained by the justices of that district. (*Fry on Lunacy Acts*, p. 97, and note.)

Meanwhile the insane having greatly multiplied in numbers, in proportion as the medical science of the day advanced in its knowledge and appreciation of the physiology of the disease, and forming an exceptional class whose condition required for its successful treatment such space and isolation as could not be obtained in a general hospital, the governors of the New York Hospital applied to the Legislature for assistance to enable them to build a separate structure for this class of patients. This was granted them by chap. 54, Laws of 1806, and the new structure was opened in July, 1808. This asylum, the first of its kind in the State, may be said to have inaugurated that system of distinct medical treatment and domestic provision for the insane which has since become grafted upon the public policy of our Commonwealth.

By chapter 90 of the Laws of 1809, § 3, authority was granted the overseers of the poor of any city or town in the State to contract with the governors of the New York Hospital for the maintenance and care of any lunatics chargeable to such city or town. This act was the initiatory step taken by the Legislature in the recognition of the insane as a special class of diseased persons, requiring medical care and treatment in institutions of a definite character. It also established the principle of its judicial custody over them as its wards, to be protected and supervised in their persons as well as in their estates through the agency of its courts and appointed officers.

The need of more extensive accommodations for the insane in New York continuing to increase, the Legislature, by chap. 203 of the Laws of 1816, made an appropriation to enable the Society of the New York Hospital to erect a new building for that class of patients.

The following is the language of the act:

“WHEREAS the governors of the New York Hospital have represented to the Legislature that the building heretofore erected for the accommodation of insane patients has, by reason of their increased

number, become wholly inadequate for the purpose for which it is intended, that they are desirous of erecting another building for the said purpose, and have purchased a very eligible site for the same, but that the funds of the institution being merely sufficient for its ordinary expenses, they are unable, without the aid of the Legislature, to carry their intention into effect ;

And, WHEREAS there is no other institution in the State in which such patients can be taken care of and relieved ;

And, WHEREAS humanity and the interest of the State require that fit provision should be made for the care and cure of insane persons ; therefore,

Be it enacted, etc., “ that during the period mentioned in the first section of the act entitled ‘ An act for the better and more permanent support of the Hospital in the city of New York,’ the Treasurer of this State shall pay to the treasurer of the Society of the New York Hospital in quarter-yearly payments, out of any moneys not otherwise appropriated, the annual sum of ten thousand dollars, the first quarter-yearly payment to be made on the first day of May next, which said annual sum shall be chargeable upon the duties on sales at public auction or vendue in the city of New York. *Provided always,* that all payments heretofore directed by law, to be made out of the aforesaid duties for the support of charitable institutions in the city of New York, shall be made previous to the payment of the sum hereby granted to the said Society of the New York Hospital.”

Whatever other sources of support it may have possessed, it appears by the books of the State Comptroller that the Society of the New York Hospital has received from the State in the form of annual subsidies, from the year 1806 to 1866, the aggregate sum of \$1,279,229. With the first installment of means received it had erected a substantial stone building within the same inclosure and adjoining the original hospital. This asylum, as already stated, was opened in July, 1808. But it proved insufficient for the purposes contemplated, whereupon, the society, with the additional subsidies received, purchased land in the upper part of Manhattan Island, upon which in May, 1818, they proceeded to erect larger and more suitable buildings for the care of the insane. These structures were completed in 1820, and opened for use in June, 1821, under the designation of the Bloomingdale Asylum.

As the capacity of these structures did not provide accommodations for more than 200 insane patients, they were wholly inadequate for the number of such persons in the

State. Necessarily their wards were soon filled with those who could pay for their own support, leaving the pauper insane practically still uncared for. It is true that the governors of the institution had resolved to admit paupers at the moderate rate of two dollars a week, so as to induce the supervisors of counties to contract with them for the maintenance of such patients under the provisions of chap. 90 of the Laws of 1809. But it appears from the report of a committee of the Legislature, made in 1831 (see *Hist. Lunacy Legislation*), that very few counties availed themselves of this offer. Meanwhile the matter of admitting or refusing pauper lunatics being entirely optional with the governors of the hospital, they appear to have discouraged their reception within its walls by the adoption of the following by-law, viz. :

“No other than pay patients shall be received into the asylum except by the express direction of the board of governors. Paupers from any part of the State may be admitted *at the lowest rate for which they can be supported*, on the order of the overseers of the poor whence they are sent, which order shall be held as security for the maintenance of such pauper” (*By-Laws and Regulations*, page 78.) The date of these by-laws is not stated, but they fully express the policy early established in its history of making this institution a private one, although so largely endowed by the State.

In the words of Gov. Marcy, expressed in his annual message in 1834, this asylum “was in fact closed to that class of patients presenting the strongest claims upon the public bounty, and has always remained so.”

The poor-houses being thus left the only available receptacles for the pauper insane in the State, the county of New York supported its own in the alms-house and its attached hospital, both situated on the grounds of the present Bellevue Hospital. There they remained, with such scanty accommodations as the place afforded, and with little chance

of recovery under the most favorable circumstances, until the year 1839, when the commissioners of the alms-house opened the new lunatic asylum on Blackwell's Island. This was the first institution of its kind erected by the county of New York. The commissioners' records show that on the 10th day of June, 1839, 197 lunatics were removed from the alms-house and hospital to the new asylum. Additional buildings, severally known as the *lodge* and the *retreat*, and *pavilions*, have from time to time been erected as auxiliaries to the parent institution, and from 197 lunatics of both sexes admitted there in June, 1839, there were in June, 1877, 1,450 *women* alone in these three buildings and their pavilion annexes.

In 1868 it became evident that increased provision for the insane of New York county must be made. Accordingly the city government early in the next year sought and obtained permission from the Legislature to issue bonds for the purpose of raising a fund to construct a new insane asylum on Ward's Island. The following is the enabling act:

The mayor, aldermen and commonalty of the city of New York are hereby authorized and directed to create a public fund, or stock, to be denominated "city lunatic asylum stock," for an amount not exceeding three hundred thousand dollars, which said stock shall bear date the first day of August, eighteen hundred and sixty-nine, and shall bear interest at the rate of seven per cent per annum, payable semi-annually, and to be redeemed on the first day of August, eighteen hundred and eighty-nine. The said mayor, aldermen and commonalty being hereby authorized and directed to pledge the faith of the city and county, and the same is hereby specially pledged for the redemption of the said stock and the several parts thereof when the same shall become due and redeemable under the provisions of this section, by tax upon the estate, real and personal, in the city of New York subject to taxation. (§ 1, *ch.* 56, 1869.)

The comptroller of said city of New York shall, within thirty days after being required in writing by the Commissioners of Public Charities and Correction so to do, prepare and issue the said stock specified in the preceding section, in amount to be specified by said Commissioners, and not exceeding the said sum of three hundred thousand dollars, and offer the same for sale, such offer to be by advertisement in not less than three newspapers published in the city of New York of the largest circulation, for not less than twenty days and more than thirty days; at the expiration of which time said stock

shall be awarded to the highest bidder therefor, and the proceeds thereof shall be forthwith deposited with the chamberlain of said city to the credit of the said Commissioners of Public Charities and Correction. The said comptroller shall determine what shall be the amount or value of said stock per share, and of what number of shares the same shall consist, but he shall not be authorized to dispose of any of the same at a less rate than its par value. (§ 2, *same ch.*)

The chamberlain of the city of New York shall receive from said comptroller, as above specified, the proceeds of said stock, and shall pay over the same in such sums and to such persons as said Commissioners, or a majority of them, shall direct in writing, but only for the purpose of providing additional buildings for the reception and care of lunatics in said city. (§ 3, *same ch.*)

The board of supervisors of the county of New York shall cause to be raised by tax, in addition to the ordinary taxes, yearly and every year, a sum sufficient to pay the interest semi-annually upon the stock provided for by this act, and for the payment of the same at the maturity thereof. (§ 4, *same ch.*)

The above loan not being found adequate for the completion of the asylum, a further loan of four hundred thousand dollars was authorized the next year by chap. 120, Laws of 1870, as follows:

SECTION 1. The mayor, aldermen and commonalty of the city of New York are hereby authorized and directed to raise by loan, in the manner provided in the act chapter fifty-six, Laws of eighteen hundred and sixty-nine, a further sum of four hundred thousand dollars, for the construction and completion of a lunatic asylum on Ward's Island, now being erected by the Commissioners of Public Charities and Correction of the city of New York.

§ 2. All the provisions of the act to which this act is an addition shall apply to the said sum of four hundred thousand dollars hereby authorized to be raised, and stock shall be issued therefor, and provision shall be made for the disposition and redemption thereof, and the payment of interest thereon, in the same manner and with like effect as if such further sum had been embraced in and authorized by the said original act.

This new asylum erected on Ward's Island is a magnificent structure of brick, trimmed with sand-stone, and well equipped for the uses intended in its construction. It was opened in 1871. Upon receiving this addition to their insane department, the Commissioners of Charities and Correction removed all their male lunatics to this institution, leaving the occupancy of the Blackwell's Island structure to women alone. The new asylum already contains over seven hundred males. Yet such is the demand for accommodations for the insane that an additional wing is in pro-

cess of construction, capable of providing for over one hundred and fifty patients.

KINGS COUNTY.

Pauper lunatics in Kings county, as in other counties, were formerly kept in the poor-house asylum on the county farm at Flatbush. In 1844 the need of better accommodations for this increasing class led to the passage of chap. 203 of the Laws of 1844, which authorized the county treasurer to borrow six thousand dollars on the credit of the county, to erect a new lunatic asylum at Flatbush. By chapter 351 of the Laws of 1851, the supervisors of the county were authorized to borrow fifty thousand dollars for this same purpose. By chapter 255 of the Laws of 1853, the county treasurer was authorized to borrow fifty thousand dollars to be expended in the completion and furnishing of the new lunatic asylum at Flatbush. By chapter 92 of the Laws of 1855, the county treasurer was further authorized to borrow thirty-five thousand dollars for the same purpose. But the steady increase in the number of the insane soon rendered it necessary to make additional provision for their accommodation. Accordingly, the Legislature, by chap. 221 of the Laws of 1860, again authorized the creation of a loan of fifty thousand dollars to erect an addition to the lunatic asylum. This loan proving insufficient for the purpose, it was supplemented by a further loan of one hundred and thirty-five thousand dollars, under the provisions of chapter 546 of the Laws of 1867. By these various loans, amounting in the aggregate to three hundred and twenty-six thousand dollars, the county has now secured a large and comfortable institution, which, with the new department dedicated to the chronic insane, will enable it for some time to come to give suitable accommodations to all its insane.

The following are the legislative provisions specially applicable to the insane of this county :

Chap. 174, Laws of 1844.

§ 8. If any lunatic patient heretofore received and admitted into the lunatic asylum on the county farm in the county of Kings, as a pauper lunatic, or who may hereafter be received and admitted into the said asylum as such pauper lunatic, be entitled to or possessed of wages, money on deposit or other personal property, or who may, during his or her continuance in the said asylum, become entitled to or possessed of wages, money on deposit, or other personal property, it shall be lawful for the superintendents of the poor of the said county to ask, demand, settle, sue for, recover and receive all such wages, money on deposit, or other personal property, and on the receipt or recovery thereof, to give proper acquittances and sufficient discharges for the payment or delivery of the same; and when so received or recovered, to appropriate and apply the same for and toward the expenses which have been incurred, or which may be incurred by the said superintendents of the poor, in the maintenance and support of such pauper lunatic, in such manner as they may deem proper. And it shall be the duty of the said superintendents of the poor to render to the board of supervisors of the said county, at their annual meeting, an account of all wages, money on deposit or other personal property, as aforesaid, by them received and expended, and for and on whose account so received and expended, or under their direction, during the year preceding such annual meeting.

§ 9. All the provisions contained in the preceding eighth section of this act relative to pauper lunatics shall also be applicable to any poor and impotent person chargeable, or becoming chargeable, to the said county of Kings; and the superintendents of the poor of the said county shall have and possess the same powers and remedies, as therein set forth and expressed, for the maintenance and support of every such poor and impotent person who may be under their charge.

At this time pauper lunatics were committed under 1 R. L. 116 (*chap. 31, Laws of 1788*), 1 R. S. 634, § 4; and in any place approved of by the supervisors of the county, whether asylum or poor-house. (See *chap. 218, Laws of 1838; amending Tit. 3, Ch. 20, Part 1 of R. S.*)

Chap. 357, Laws of 1845.

By section 1 of this act it is enacted that,

Hereafter no insane person or lunatic being in indigent circumstances, and whose maintenance or support shall be chargeable, or likely to become chargeable, to the county of Kings, shall be admitted into the State Lunatic Asylum upon the order of any court, justice, judge or Supreme Court commissioner, or upon the authenticated certificate of the first judge of the said county of Kings, unless such order or certificate shall be accompanied by the written designation or approbation of the superintendents of the poor of the said county; any thing contained in any law of this State to the contrary thereof notwithstanding.¹

1. This act empowers the county of Kings to take charge of all its pauper insane, whether recent or chronic cases, and to treat them in its own asylum. The term "*indigent*" is there applied in its generic sense to all who are or may become chargeable for their maintenance to the county. It is not intended to be qualified as in chap. 135, Laws of 1842, § 26, where it is recited that "when a person in indigent circumstances *not a pauper*, etc." (*Chap. 446 of 1874, Tit. 1, § 14.*)

By § 1 of chap. 491, Laws of 1871, the superintendents of the poor of Kings county are hereafter to be known and designated as the "commissioners of charities of the county of Kings." The following are the acts relating to the County Lunatic Asylum:

Chap. 350, Laws of 1851.

§ 2. The said board of supervisors are hereby also authorized to raise, by tax or loan, a sum not exceeding fifty thousand dollars; the money so raised shall be laid out and expended under the direction of the said board in the purchase of land, and the erection thereon of a new lunatic asylum, or either of said objects, as may be deemed necessary.

Chap. 255, Laws of 1853.

SECTION 1. The treasurer of the county of Kings is hereby authorized, under the directions of the board of supervisors thereof, to borrow, on the credit of the county, a sum not exceeding fifty thousand dollars, and to give his official bond or bonds for the payment of the same, with interest annually; the money so borrowed to be laid out and expended under the direction of the said board of supervisors in the completion and furnishing the lunatic asylum on the county farm, in the town of Flatbush.

Chap. 92, Laws of 1855.

SECTION 1. The treasurer of the county of Kings is hereby authorized, under the direction of the board of supervisors thereof, to borrow, on the credit of the county, a sum not exceeding the sum of thirty-five thousand dollars, and to give his official bond or bonds for the payment of the same, with interest annually; and none of said bonds shall be disposed of for less than the par value thereof; the money so borrowed to be laid out and expended under the direction of the said board of supervisors, in the completion of the lunatic asylum on the county farm, in the town of Flatbush.

Chap. 221, Laws of 1860.

SECTION 1. The treasurer of the county of Kings is hereby authorized, under the direction of the board of supervisors thereof, to borrow, on the credit of the county, a sum not exceeding fifty thousand dollars, and to give his official bond or bonds for the payment of the same, with interest, annually; the money so borrowed shall be laid out and expended, under the direction of the said board, in the erection of an addition to the lunatic asylum on the county farm, in the town of Flatbush.

§ 2. The said board of supervisors shall cause to be levied and collected, and paid, annually, such sums as may be necessary to pay the interest on the money so borrowed, and to pay the principal in annual installments as the same becomes due; the number and times of payment of said installments shall be determined by the said board of supervisors when they shall give the first directions to the county treasurer to borrow money under this act, and the treasurer shall immediately apply the money so collected and paid to him toward the payment of the interest and principal of the money so borrowed.

Chap. 546, Laws of 1867.

SECTION 1. The treasurer of the county of Kings is hereby authorized, under the direction of the board of supervisors of Kings county, to borrow on the credit of said county a sum not exceeding one hundred and thirty-five thousand dollars, and to issue bonds in such form as the said board may prescribe, for the payment of the same, with interest payable annually, or semi-annually, as the said board may direct; the money so borrowed to be expended under the direction of said board in the erection of a building or buildings for the care of the insane poor of the said county. Such bonds shall be issued in the name and under the seal of the county of Kings, and shall be signed by the chairman of the board of supervisors and the county treasurer, and countersigned by the clerk of the board of supervisors. The said clerk shall keep a record showing the date, amount and rate of interest of said bonds respectively, with the time they may become due.

§ 2. The said board of supervisors shall cause to be levied and collected and paid annually such sum as shall be necessary to pay the interest on the money so borrowed, and in the year eighteen hundred and eighty-two such sum as shall be necessary to pay the principal of the money so borrowed, and the treasurer shall immediately apply the money so collected and paid to him, toward the payment of the interest and principal of the money so borrowed.

MONROE COUNTY.

The following are the legislative provisions specially applicable to the insane of this county. It will be perceived by § 9 of this act that the county is authorized,

like New York and Kings county, to care for its insane of every class :

Chap. 82, Laws of 1863.

SECTION 1. The insane asylum of the county of Monroe shall, after the passage of this act, be a separate and distinct institution from that of the Monroe county poor-house, and the board of supervisors of said county shall have the sole control, management and superintendence thereof.

§ 2. The board of supervisors of said county shall have full power and authority at any annual meeting or at any special meeting of the board called for that purpose, after the passage of this act, to make all needful rules and regulations for the management, regulation, support and control of said asylum. They shall also have power, at any meeting held as aforesaid, to elect by ballot some suitable person to act in the capacity of warden of said asylum, a majority of said board of supervisors being necessary to elect, who shall hold his office for three years, unless removed by said board of supervisors for incompetency, misconduct or neglect of duty. Said warden shall, before he enters upon his duties as such warden, execute and deliver to the said board of supervisors his bond, with two or more sureties, to be approved by said board, in such amount as said board of supervisors may require, for the safe-keeping and true accounting of all moneys and other property which may come into his possession as such warden. Said board of supervisors shall fix the salary of such warden and such other subordinate officers as may be by them deemed necessary, and such salary, when fixed, shall not be changed during the term of office for which such persons may be chosen.

§ 3. The said board of supervisors shall have power, and it shall be their duty, at the first meeting after this act takes effect, to elect by ballot three freeholders of said county who shall constitute a board of trustees of said asylum. The ballots used at such election shall contain the name of one person, and the person having the greatest number of votes on the first ballot shall be elected for three years ; the person having the greatest number of votes on the second ballot shall be elected for two years, and the person having the greatest number of votes on the third ballot shall be elected for one year ; a majority of the votes of all members of the board shall be requisite to make such election legal. The said board of supervisors shall, at each annual meeting thereafter, elect one such trustee who shall hold his office for three years. Said trustees shall be entitled to receive mileage at the rate of five cents for each mile traveled in the necessary discharge of their official duties in going to and returning from said asylum, which shall be audited by said board of supervisors the same as other county charges, and such trustees shall receive no other pay whatever.

§ 4. The warden shall be the chief officer of the asylum and the general superintendent of the ground and buildings, together with the furniture and fixtures, and the direction and control of all persons therein, subject to the regulations established by the board of supervisors. He shall also ascertain daily, so far as possible, the wants and

condition of all patients in said asylum, and prescribe their treatment in the manner directed in the by-laws. He shall, from time to time, give such orders and instructions as he may deem best calculated to insure good conduct, fidelity and economy in every department, and he is authorized and empowered to maintain salutary discipline among all who are employed in the asylum, and to enforce strict compliance with such instructions, and uniform obedience to all the rules and regulations of the asylum. He shall further cause full and fair accounts and records of all his doings as such warden, and the business and operations of the asylum, to be properly kept in books provided for that purpose, which books shall at all times be open to the inspection of the trustees or board of supervisors, or any committee of said board appointed to examine the same. The said warden shall, by and with the advice and consent of said trustees, or a majority of them, appoint all subordinate officers of the asylum, the number of such officers to be fixed and determined by the by-laws of the asylum.

§ 5. The warden, under the direction of the trustees, or a majority of them, shall make all purchases for said asylum. He shall preserve and keep the original bills and receipts, with full copies of all orders drawn by him; make all contracts, in the official name of the trustees, with attendants and assistants; keep and settle their accounts, and shall also keep a just and true account of all expenses for the support of patients, incurred in their behalf, and he shall be strictly accountable for the careful keeping and economical use of all furniture, stores and provisions provided for said asylum, and during the third week in September of each and every year make and file with the trustees a full and perfect inventory of all the property belonging to the asylum in and about the premises, with an appraisal thereof made under oath by himself and some discreet householder of the county of Monroe who shall be chosen by the trustees for that purpose, which inventory and appraisal, together with his annual report, shall be presented to the board of supervisors on or before the second Tuesday of October thereafter.

§ 6. The board of supervisors of the said county shall have power, at any annual meeting after this act takes effect, and it shall be their duty, to cause such tax to be levied and collected on the taxable property of the county, as will, in their judgment, be sufficient to defray all expenses of the asylum during the next ensuing year, which tax, when so levied and collected, shall be paid to the treasurer of said county and placed to the credit of the Monroe county insane asylum, in a book kept for that purpose; and such moneys, so collected and paid to said treasurer as aforesaid, shall be used for the support and care of the insane in said county, and for no other purpose whatever. Said moneys may be drawn by the warden upon his order, from time to time, as the same may be needed for the use of the asylums.

§ 7. The said warden shall have full power to enter into contract with any individual of said county, or any town thereof, or with the city of Rochester in said county, for the support and treatment of any insane person at said asylum, upon such terms as he may deem just; and such contract, when so made, shall be legal and binding upon the respective parties; the payments on such contracts to be made to the said warden, who shall render a full and true account

annually to said board of supervisors of all moneys so received, and also the number and nature of all such contracts and with whom made.

§ 8. The warden of said asylum, by the direction of the board of supervisors of said county, or by the direction of the trustees of said asylum, shall have power to demand and receive from the State lunatic asylum any and all persons who now are, or who shall become, chargeable hereafter to said county, or to any town or city in said county, and the managers of said State lunatic asylum shall, on demand as aforesaid, surrender up to said Monroe county insane asylum any and all persons who, at the time of making such demand, shall in any wise be chargeable to said county of Monroe, or any town or city in said county.

§ 9. No insane person or lunatic residing in the county of Monroe, being in indigent circumstances, and whose maintenance or support shall be chargeable, or likely to become chargeable, to said county or any town or city in said county, shall hereafter be admitted into the said State lunatic asylum upon the order of any court, justice, judge, or upon the authenticated certificate of the judge of said county of Monroe, unless such order or certificate be accompanied by the written consent or approval of the trustees of said Monroe county asylum, or the chairman of the board of supervisors of said county.

Chap. 143, Laws of 1861.

§ 236. The common council may cause such labor in manufactures, or otherwise, to be performed by the tenants of such alms-house as they shall prescribe, and may provide the materials and implements therefor at the expense of the city, and they may also erect, in the said alms-house, proper cells and rooms for the confinement and care of lunatics and idiots, and other persons confined therein, and may provide for them, and for the care of such lunatics, and may contract with the supervisors of the county of Monroe, and with any other person, for the support and care, and medical and surgical attendance, of any lunatics, idiots, insane, sick, diseased or maimed persons.

Chap. 633, Laws of 1870.

SECTION 1. It shall be the duty of the trustees of the Monroe county insane asylum, and they are hereby empowered to hear and determine all questions and inquiries in relation to indigent lunatics and pauper insane who may be committed to said asylum, as to whether the maintenance of such lunatics and pauper insane is properly a charge upon a specified town in the county of Monroe, or upon the city of Rochester, or upon the county of Monroe, and shall certify their decision to the board of supervisors of said county, and the said board shall cause the expenses of maintenance as aforesaid, to be levied against the said town, city or county, and collected as the said board of trustees shall thus certify.

§ 2. The said board of trustees are hereby authorized and directed further, when any lunatic, not indigent or a pauper, is placed in said asylum, to charge the estate of such lunatic or the persons legally respon-

sible for his maintenance, and to collect the same at such time in each year as may be determined by the board, and the amount so collected shall be applied for the maintenance of said lunatic, and the board shall include the statement of such collection and disbursement in their annual report now required by law.

Chap. 142, Laws of 1877.

AN ACT to amend chapter one hundred and one of the laws of eighteen hundred and sixty-two, entitled "An act in relation to the support and custody of indigent insane persons of the county of Genesee."

SECTION 1. Section two, chapter one hundred and one of the laws of eighteen hundred and sixty-two, is hereby amended so as to read as follows :

§ 2. Whenever the county judge of said county shall, after the passage of this act, make a certificate concerning any insane person in indigent circumstances, not a pauper, in pursuance of chapter twenty, title third, part first of the Revised Statutes, such insane person shall be admitted into the insane asylum connected with said poor-house mentioned in the first section of this act, there to remain at the expense of the town in said county in which such insane person shall have a legal settlement, until he or she shall be restored to soundness of mind or shall be discharged by the superintendents of the poor of said county.

§ 2. This act shall take effect immediately.

1. This act is the *fourth* of a series of acts relating to the care of the insane in Genesee county, which will be found tabulated in chronological order in the chapter on the History of Lunacy Legislation. The ambitious title of the first act (*Chap. 298 of the Laws of 1860*) would naturally lead to the supposition that Genesee county had provided an asylum suited to the care and medical treatment of all classes of the insane, whereas in fact the accommodations there existing, in connection with the poor-house, are still, in 1877, wholly inadequate for the comfortable and safe maintenance of any other class of lunatics than the most quiet and harmless chronic cases.

The above act professes to be an amendment of the *second* act in this series, viz., chap. 101, Laws of 1862. But, when this latter is examined chronologically, it will be found that it was amended in both its sections by chap. 161, Laws of 1863, although without the introduction of any clause re-

pealing the previous act. Practically, however, the act of 1862 was repealed by merger in the subsequent act of 1863, revising the entire subject-matter of its predecessor. The rule is well settled that "a statute is impliedly repealed by a subsequent one revising the whole subject-matter of the first." (*Sedgwick's Const. & Stat. Law*, p. 105; *Bartlett v. King*, 12 *Mass.* 537; *Nichols v. Squire*, 5 *Pick.* 168; *Dash v. Van Kleeck*, 7. *Johns.* 477; *Columbian Man. Co. v. Vanderpool*, 4 *Cow.* 556; *Miner v. German Savings Bk.*, 2 *Daly*, 406.) In legal acceptation, therefore, the act of 1862 not being in existence after the passage of the act of 1863, there was no statute *eo nomine*, to amend in the present year; consequently there was no statute to which chap. 142 of the Laws of 1877 can be made to apply.

But, if any doubt can arise as to this interpretation of the repeal of the act of 1862, it will be instantly dissipated by calling to mind the fact that by chap. 446 of the Laws of 1874, which was a general law, entitled "*An act to revise and consolidate the statutes of the State relating to the care and custody of the insane*," etc., etc., all special and local acts in any way repugnant thereto were abrogated by a general repealing clause. (*Tit. XI*, § 2.) It follows from this as an inevitable conclusion, that the above chapter 142 of the Laws of 1877 is wholly void and inoperative.

Chap. 360, Laws of 1877.

AN ACT in relation to the maintenance of the chronic insane poor of the county of Clinton.

SECTION 1. All chronic insane paupers now confined in the Willard Asylum for the Insane, who have been sent to said asylum from the county of Clinton, and all chronic insane pauper patients now in said asylum chargeable to said county, and who have been discharged not recovered from the State Lunatic Asylum, and all such patients as shall hereafter be so discharged from said State Lunatic Asylum shall be sent to the county poor-house of said county, upon the demand or at the request of the superintendent of the poor of said county, there to remain, chargeable to the towns in said county where such paupers may have legal settlements, and the expense of such transfer shall be chargeable to the towns in said county where such paupers may have legal settlements. ¹

§ 2. This act shall take effect immediately.

1. This statute, so far as the county of Clinton is concerned, nullifies chapter 713 of the Laws of 1871, giving to the State Board of Charities the right of exempting counties from the operation of § 110 of chapter 342 of the Laws of 1865, requiring all the chronic insane from the poor-houses, and those discharged from State asylums as uncured, to be sent to the Willard Asylum. It is a retrogression from the policy established by the State in the organization of the Willard Asylum for the Chronic Insane, and in derogation of the powers of exempting counties, granted to the State Board of Charities, as the proper judge of the competency of the provisions made by such counties for the care of their own chronic insane.

Chap. 363, Laws of 1877.

AN ACT to authorize the Orange County Asylum for the Chronic Insane to receive patients or inmates from adjoining counties.

SECTION 1. All judicial officers, magistrates or superintendents of the poor in the counties of Sullivan, Ulster and Rockland, now having jurisdiction and power of commitment over chronic insane persons or lunatics, shall, upon the passage of this act, have power and authority to commit all such chronic insane persons or lunatics to the Orange County Asylum for the Chronic Insane, near Goshen, in said county of Orange, provided the superintendent of the poor of Orange county, or his successors in office, shall first consent thereto in writing in each case, and shall enter into a binding and valid contract on behalf of the said county of Orange, with the proper authorities of the county or counties from which such patient, lunatic or chronic insane person or persons shall be committed, for the maintenance and support of every such person so committed or transferred to the Orange County Asylum aforesaid.

§ 2. The provisions of this act shall in like manner and upon like conditions be extended and applied to such chronic insane persons as may now be in the custody of either of the superintendents of the poor of the aforesaid counties of Sullivan, Ulster or Rockland.

§ 3. Nothing in this act shall be so construed as to abridge or in any manner interfere with the powers or duties of either the State Board of Charities, or the State Commissioner of Lunacy in their superintendence and management of the chronic insane.

§ 4 This act shall take effect immediately.

1. This statute is, in spirit and intent, similar to the preceding, with the additional powers granted of taking the chronic insane from the counties of Sullivan, Ulster and

Rockland. The 3d section is superfluous inasmuch as the statute applies exclusively to certain enumerated counties, and for distinct purposes, and does not in any sense "abridge or interfere with the powers or duties of either the State Board of Charities, or the State Commissioner in Lunacy, in their superintendence or management of the chronic insane."

The foregoing acts show very plainly the increasing disposition on the part of the counties to resume the care of their chronic insane, with, in many instances, an ulterior hope of obtaining, or assuming the right of also treating acute cases of insanity. This is often done now by a connivance between county officers of all grades, who, on the plea of economy, evade the law relating to the speedy commitment of recent cases to State Asylums, and thus convert Poor-House Asylums into manufactories of chronic lunatics.

CHAPTER SIXTH.

PROCEDURE IN LUNACY.

- TIT. 1. Jurisdiction of courts.
- TIT. 2. Commissions of lunacy.
- TIT. 3. Inquests of office and their effects.
- TIT. 4. Traverse.
- TIT. 5. Supersedeas.
- TIT. 6. Committees.
- TIT. 7. Suits for and against lunatics.
- TIT. 8. Costs.

The Revised Statutes having established a distinction between idiots and lunatics by terms of express definition (2 *R. S.*, *Pt.* 1, *Ch.* 20, *Tit.* 3, § 37), and different asylums being assigned to each class with different forms of custody, it becomes necessary to inquire briefly into the sources of these definitions, before treating of the forms of procedure incidental to the judicial establishment of a case of lunacy.

At common law the phrase *non compos mentis* was used by COKE to designate all forms of unsound mind deemed incapable of governing themselves or managing their own affairs. (1 *Inst.* 246; 1 *Bl. Comm.* 302.) The term "idiot," on the other hand, has always described but one class of individuals, and among English jurists is a legal term signifying a person who has been without understanding from his nativity and whom the law, therefore, presumes is never likely to attain any. (3 *Mod.* 44.) But imbecility is not regarded at law as the correlative of idiocy; nor is a person of weak mind, if he appears otherwise capable of governing himself and his estate, deemed to be of unsound mind. (*Ball v. Mannin*, 1 *Dow. Pr. C.* [N. S.] 392; *Shelford*, 3.)

Unsoundness of mind, such as constitutes one a *non compos*, under our statutes means a total incapacity *quoad hoc*,

from whatever cause produced, exhibiting itself in a person previously in the enjoyment of full mental power. These distinctions as recognized by our courts may, therefore, be recapitulated as follows, viz. :

1st. An idiot is one who has been destitute of understanding from his nativity, and has not ever attained and presumably will never attain the mental majority common to men.

2nd. A lunatic is one who has lost the use of his reason, but may have lucid intervals during which his acts assume a character of *quasi* validity, until either judicially ratified, or judicially annulled.

3d. Persons of unsound mind properly include lunatics, as well as all others who become so by any causes not within that circle of acute mental disorders represented by insanity. Thus, those under delirium or temporary derangement from disease or other cause; or those who, whether from old age, sickness, or habitual drunkenness, become incapable of governing themselves or their estates, are under our statutes *non compotes mentis*, or persons of unsound mind.

4th. Persons, born deaf and dumb, are not necessarily either idiots, imbeciles, or of unsound mind, but until some test of their mental capacity has been made, the presumptions favor such a view, and an inquisition should be awarded to determine the question.

So, too, persons who become deaf and dumb or incapable of correctly receiving or communicating any ideas, so as to exhibit an intelligent apprehension of the nature and consequences of the act they are performing. Such may be the results flowing from attacks of apoplexy with partial recovery; effusions within the cavities of the brain; forms of paralysis interfering with speech, or lastly, aphasia. None of these conditions necessarily constitute insanity, although some of them may practically amount to unsoundness of mind.

A commission in the nature of a writ *de lunatico inquirendo* may be awarded in any of the foregoing cases.* It may issue against any person, wherever residing, who has property within this State, and may be executed at any point within the State which may appear most convenient for the purposes intended. If an inquisition has been taken in a foreign State against a resident there, it may be perhaps sufficient evidence to warrant an inquisition here upon a new commission, but such foreign inquisition will not of itself authorize the sale of a lunatic's estate situated here. These principles will be found fully discussed in their appropriate places beyond.

PETITION.

The method for obtaining a commission of lunacy is, by petition, duly sustained by affidavits, and presented to a court of competent jurisdiction. For without such proceedings the court can acquire no jurisdiction to appoint a committee or to order a sale of the lunatic's property. (*Matter of Payn*, 8 How. 220; *Matter of Mason*, 1 Barb. 436.)

A petition can be presented by the relatives of the alleged lunatic, by a husband or wife, by an executor of a will against a legatee under the same will, by a trustee against his *cestui que trust*; by creditors against a debtor, or by strangers. (1 *Moulton's Ch. Pr.* 109; *Shelford*, 114; *Ex parte Smith*, 17 *Leg. Int.* 332.)

In general, the nearest relatives of the alleged lunatic have the preference given them over strangers in the carriage of a commission, unless there be some valid objection thereto. (*Ex parte Tomlinson*; *Ex parte Broadhurst*, 1 *Ves. & Bea.* 59.) But it will be granted to strangers even in preference to relatives, where the latter are shown either to

* According to the report of the English Commissioners in Lunacy, made in 1849, it appears that a previous inquisition under the forms directed by the Court of Chancery is, in fact, practically had, in but few instances, or in a very small proportion of the whole number of commitments made to asylums there. Thus out of 4,028 patients in England, who were confined in asylums on the 1st of January, 1842, but 245 had been found insane by special inquisition.

have misused the alleged lunatic or to be for any reason unfit. (1 *Russell*, 348; *Shelford*, 116.) And wherever it appears that the parties applying for the commission are actuated by improper motives, the carriage of it will be given to others, since the object to be kept in view is the protection of the lunatic and his interests. (*In re Whittaker*, 4 *My. & Cr.* 441.)

In England, the cost of a commission and consequent orders is, relatively speaking, so very high, that in the case of a small estate much of it might be consumed in procedure alone. In consequence of this the Court of Chancery has power, by statute, where there is a fund belonging to lunatics under its control, to direct a reference to a master in lunacy to inquire into and report upon the state of mind of the party, and thereupon may appoint a guardian to take charge of him and his estate, in like manner as if he had been found by inquisition a lunatic. (8 & 9 *Vict.*, *Ch.* 100, §§ 94, 95.)

The application for a commission, by whomsoever made, must be sustained by affidavits showing that there is good reason to suspect that the party is of unsound mind. Facts, as well as conclusions, must be recited in them. And these affidavits should also be accompanied by one or more medical certificates under oath, substantially verifying the allegations set forth in the petition. Unless these preliminary proofs are strong enough to amount to a probability of insanity, the court will not entertain the application. (1 *Moulton's Ch. Pr.* 109; *Ex parte Persse*, 1 *Moll.* 219; *Ex parte Lincoln*, 1 *Brewst.* 392.) The reason for this rule is, that the mere issuing of a commission against an individual engaged in a large business, and having numerous agents acting under powers from him, might give rise to consequences of a most disastrous character to his interests and the community. An act of such a responsible kind as that will not be performed by any court, except upon evidence amounting to a very strong probability. And cases are reported in

England where the court, before granting the commission, has caused the alleged lunatic to be examined by physicians of its own selection, in order to be certified of the fact by disinterested parties. (1 *Shelford*, 72; *Matter of Payn*, 8 *How. Pr.* 220.)

In *Ex parte Tomlinson* (1 *Ves. & B.*) the court said, that the true point to consider on such an application is, whether it is for the benefit of the lunatic or his property that a commission should issue. This, therefore, is the legal test.

TITLE FIRST.

JURISDICTION OF COURTS IN MATTERS OF LUNACY.

The Supreme Court, as the constitutional successor of the Court of Chancery, the County Courts, and the several city courts, having, by statute, jurisdiction given them over the persons and estates of idiots, lunatics, persons of unsound mind and habitual drunkards, may each issue commissions of lunacy. (*Vide Tit. 2d, Chap. 446 of 1874, and Code of Civ. Pro.*, § 340.) But, in the exercise of that jurisdiction, they will be governed in every case by the particular circumstances existing at the time the action is brought. (*Koppel v. Heinrichs*,¹ *Barb.* 449.) Thus, whenever a lunatic has lands or personal property in this State, although domiciled abroad, these courts may issue a commission of lunacy. Or if a foreigner temporarily resident here becomes insane, a committee of his person and estate may in like manner be appointed; and if it be shown to be for the mental and physical advantage of such lunatic that he should be sent home, the court may, in its discretion, order the same done. (*Matter of Colah*, 3 *Daly*, 529.)

In England it has been a well-established principle that a commission might be granted against a foreign resident

there, or against an Englishman residing abroad. (*Stock on Non Compos Mentis*, 94; *In re Southcote*, *Amb.* 109; *In re Sotomajor*, *L. R.*, 9 *Ch.* 677; *In re Garnier*, *L. R.*, 13 *Eq.* 532; 41 *L. J. Ch.* 419.)

In *Ex parte Smith* (1 *Swanst.* 3.) a commission of lunacy was directed to be executed in the neighborhood in which the lunatic resided prior to his lunacy, and not in that to which he had been conveyed, although evidence was given of his inability to bear removal. And the ground there taken was that the court could not grant a commission to be executed at any other place than the residence of the alleged lunatic. For a man cannot be said to reside in a place to which he has been carried, while he had not mind enough to intend a change of residence. (*Ex parte Hall*, 7 *Ves.* 261.)

It is needless to say, however, that such commission cannot be executed outside the limits of the State, although it can be at whatever point therein may be specified by the court as most convenient for all parties. (*Matter of Perkins*, 2 *Johns. Ch.* 125; *Matter of Pettit*, 2 *Paige*, 174; *L'Amoureux v. Crosby*, *Ib.* 422; *Matter of Ganse*, 9 *Ib.* 416; *Matter of Taylor*, *Ib.* 611; *Matter of Colah*, 3 *Daly*, 529; *In re Sotomajor*, *L. R.*, 9 *Ch.* 677; *In re Garnier*, *L. R.*, 13 *Eq.* 532.)

And it must be remarked in this connection also, that, the civil jurisdiction of States not being extra-territorial, it follows that a foreign commission will not authorize the sale of a lunatic's estate under it, when situate in New York. Hence an inquisition *de novo* must be taken here, and a new committee appointed. (*Matter of Perkins*, 2 *Johns. Ch.* 124; 1 *Sch. & L.* 307; 2 *Vesey, Jr.*, 587; *Matter of Pettit*, 2 *Paige*, 174; *Matter of Neally*, 26 *How. Pr.* 402.) See "*Committee.*"

In order also to prevent frauds in proceedings of this kind, commissioners may be required to give the lunatic due notice of the time and place of executing the commis-

sion, although the lunatic resides outside of the State. (*Matter of Tracy*, 1 *Paige*, 580; *Matter of Pettit*, 2 *Ib.* 174.) But the service need not be personal, if it be shown that he cannot be reached. (*Matter of Russell*, 1 *Barb. Ch.* 38.) In such case it may be made by publication.

The petition for a commission against a non-resident must show, conclusively, that the alleged lunatic is the owner of property situated within this State. It is not sufficient to state that fact in the affidavits annexed to the petition. (*Matter of Fowler*, 2 *Barb. Ch.* 305.)

The court also has the power, in the exercise of a sound discretion, to direct the issuing of a new commission of lunacy, when from the evidence, or otherwise, there is no doubt that the jury must have erred in finding that the party proceeded against was not of unsound mind. (*Matter of Lasher*, 2 *Barb. Ch.* 97; *Matter of Donegal*, 2 *Vesey, Sr.*, 408.)

In relation, however, to disposing of the property of any lunatic, there is a limitation upon the jurisdiction of courts, founded in the necessity of first establishing a legal reason by matter of record for the exercise of such authority. Accordingly, it has been held that courts had no jurisdiction to appoint a committee of a lunatic, or order a sale of his property, upon petition of his friends and relatives, before a commission of lunacy had been issued and returned. (*Matter of Payn*, 8 *How. Pr.* 220; *Matter of Barker*, 2 *Johns. Ch.* 232; *Matter of Perkins*, *Ib.* 124; *Matter of Pettit*, 2 *Paige*, 174; *Matter of Morgan*, 7 *Ib.* 236.)

Although the verdict of a jury be necessary to give control of the person and estate of a lunatic to the court issuing the commission, a provisional jurisdiction over both attaches itself to the order granting such commission, and the court may, by injunction, interfere to protect the alleged lunatic and his interests until the finding of the inquisition. (*Bryce v. Graham*, 2 *Wils. & Sh.* 515.)

The court may also restrain persons from removing an alleged lunatic out of the country, provided it be satisfac-

torily established that the party is a fit subject for a commission and there is cause for apprehending such removal. (*Lady Man's Case*, *Ambl.* 82.) And in the *Matter of Wing* (2 *Hun.* 671), where the committee of a lunatic had removed him out of the State, he was ordered to bring him within it once a week so that the lunatic's wife might have access to him.* (*Vide In re Wykeham*, 1 *Turn. & Russ.* 537.)

An order may also be obtained from any court of competent jurisdiction allowing access, by counsel or friends, to a person held in custody as a supposed lunatic, for the purpose of enabling him and his friends to oppose the commission. (*In re Fletcher, Shelford*, 126.)

The powers exercised by courts of equity over the estates of lunatics are exceedingly wide. They may, in fact, do any thing consistent with the support of the lunatic and the protection of his estate. It has accordingly been held, that, after providing for his suitable maintenance and the protection of the estate, the court may, out of the surplus estate of the lunatic, provide for the support of parties not his kin, when satisfied that the party would himself have done so if sane. In the same way it may make an allowance for the education of children adopted by him; may authorize his committee to keep up the lunatic's family establishment in the manner habitual with him; may authorize him to place in the lunatic's hands small sums of money to be expended in charity, so long as he seems competent to make a wise distribution of the same, and may even authorize the committee to contribute toward the support of religious institutions in which the lunatic had worshiped, to the same amount in the aggregate as formerly. But the committee may not expend any portion of these funds upon general objects of

* It should be made a felony by statute to remove any lunatic having property within this State, to a foreign jurisdiction, either immediately before or pending proceedings in lunacy against him. Such an act is rarely done except from sinister motives.

charity to which the lunatic did not contribute when sane. (*Matter of Heeney*, 2 Barb. Ch. 326.) So, also, a weekly allowance has been ordered out of the surplus income of a wealthy lunatic to needy collateral relatives who were supposed to be her next of kin, though their title as such had not been established, and for whom the lunatic, while sane, had expressed an intention to make some provision. (*In re Foster*, 5 L. R. Ch. 699; 30 L. J. Ch. 808; 18 W. R. 986; 23 L. T. N. S. 233.)

The doctrine that a lunatic's maintenance is first to be secured out of his estate before any claims whatsoever against it can be satisfied, was applied to the fullest extent *In re Adey* (1 Cooper, 225), where Lord COTTENHAM refused to make an order satisfying a liability of a lunatic, until it was proved to his satisfaction that enough of his estate would be left for his maintenance. It would seem from this that in equity the fund necessary to support a lunatic is an express trust distinguishable from his general estate, and to be kept inviolate as against any and all claimants. Whatever, therefore, is most conducive to the lunatic's interests will be done as matter of legal right. Thus the funds of a non-resident lunatic, in the custody of the court, may be transferred to the State of the lunatic's residence, upon the production of a certified transcript of the proceedings in lunacy, including the appointment of the applicant as guardian or committee of the person and estate of the lunatic, and upon the execution of a bond with good security in a penalty sufficient to cover the fund in the keeping of the court, with special reference to this fund and properly conditioned. (*Clanton v. Wright*, 2 Tenn. Ch. 342.)

Where a lunatic wife has a separate estate, it may be applied to her future maintenance, in case her husband's estate is insufficient for that purpose. But this can only be done after permission granted by the court. (*Edwards v. Abrey*, 2 Coop. 177; *Peters v. Grote*, 7 Sim. 38.)

TITLE SECOND.

COMMISSIONS OF LUNACY.

Under the feudal system, the common law of England made no provision for pauper lunatics. Whether they happened to belong to the class of *villeins regardant*, or *villeins in gross*, they appear to have been equally uncared for by the sovereign authority of the realm. Inasmuch, also, as they were simply base tenants, a people living in servitude to the lord of the soil, like the cattle upon it, the loss of mind in any one of them produced as little effect upon the legal status of things in the manor as would the death or incapacity of any beast of burthen. Neither justice nor humanity toward men could be expected to spring from a system of predial servitude which, reflecting its influences upon jurisprudence, left charity to flourish only in the bosom of the church. Laws were then made only for freemen and freeholders, and paupers, whether sane or insane, had to find protection and sustenance whenever they could at the hands of private benevolence. (See *History of Lunacy Legislation, ante.*)

We seek in vain, therefore, for any general laws designating the duties of the State toward them as charitable objects. And it is perhaps as much from this cause as from the teachings of the church that sprang up the abundance of gifts to charitable uses in England.

But as soon as the element of property asserts its presence in the history of a class, we perceive the sensitiveness of the law to immediately secure it against waste or spoliation. Hence, in England, the king, as the sovereign lord of the domain and assumed protector of all his subjects, as soon as he was judicially informed that any one possessed of lands and tenements was an idiot, claimed the right of a beneficial use therein to himself, in return for the protection afforded by him. "And, therefore," says Fitzherbert (*de*

Nat. Brev. 232), "when the king is informed that one who hath lands or tenements is an idiot and is a natural from his birth, the king may award his writ to the escheator or sheriff of the county where such idiot is to inquire thereof." The whole transaction seemed to turn as much upon the opportunity to increase the revenues of the crown, being in fact *regium munus*, as it did upon humanity to the idiot. For Lord HARDWICKE, in *Ex parte Southcote* (*Ambl.* 111), observed that he could not find a single writ directed to the escheator to inquire of lunacy, because the escheator, being an officer of the crown, in cases of lunacy where no profits go to the crown, the writ was never directed to him.

Previous to the passage of the statute "*de prerogativa regis* (17 *Edw.* 2, *ch.* 10) the custody of an idiot and of his lands was vested in the lord of the fee. (*Fleta*, *Lib.* 1, *ch.* 11, § 10.) And it is probable that the number of these persons may have been great enough to give rise to the necessity of extending a more disinterested supervision over them, and their estates, than would be likely to happen at the hands of their immediate lord. The writer above cited says, in fact, that these trusts were much abused, an evident reason, therefore, for removing them from the grasp of private cupidity and placing them under the immediate care of the crown. These would seem to be the causes in which originated the necessity for an intervention of the king's prerogative over lunatics, through his chancery, in the form of writs of inquiry in cases of alleged mental incapacity.

Commissions of lunacy are proceedings of comparatively modern times. Originally they consisted of writs issued in chancery, of which only two forms were known, viz.: the writ "*de idiota inquirendo et examinando*," and the writ "*dum fuit non compos mentis*." (*Fitzherbert N. B.*, 202 and 232.) The writ "*de lunatico inquirendo*" is of recent date, not being mentioned by Fitzherbert. It will be re-

membered that Lord COKE did not consider the word "lunatic" material as a term of definition, but included it in the general class of "*non compos*" of which he made four varieties. The term "lunatic" as a designation does not appear in any of the old writs, and Lord HARDWICKE condemned its use as founded in error and superstition. (*Ex parte Barnsley*, 3 *Atk.* 168.) Even as late as his day, there were in England but two forms of writ for inquiring into the mental capacity of an alleged *non compos*, viz.: the writ *de idiota inquirendo* and the writ *de lunatico inquirendo*, and if the jury could not find that the party came within either of these classes, no committee could be appointed.

The manifest injustice of thus leaving many weak-minded persons without the protection of a court of equity led to a relaxation of the former rule, and in Lord ELDON's day commissions began to be issued in cases where they would not previously have been granted. These were not technical commissions of lunacy, but commissions in the nature of writs *de lunatico*, wherein it was not necessary to establish lunacy, but simply that the party was of unsound mind and incapable of managing his affairs. Thus in *Gibson v. Jeyes* (6 *Vesey*, 272), which was a case of imbecility, Lord ELDON observed that it was a question "whether this case might not support a commission, not of lunacy, but in the nature of a writ *de lunatico*, in which, it must be remembered, it is not necessary to establish lunacy but it is sufficient that the party is incapable of managing his own affairs." And in another similar case this same high authority said that "a commission of lunacy" is not confined to strict insanity, but is applied to cases of imbecility of mind, to the extent of incapacity from any cause, as disease, age or habitual intoxication. (*Ridgway v. Darwin*, 8 *Ves.* 64.)

Lord ERSKINE in *Ex parte Cranmer* (12 *Vesey*, 445), reiterated the views expressed by Lord ELDON, and held that a commission of lunacy was applicable to incapacity from causes distinct from lunacy. It will be evident from these

rulings how strongly the tide had turned since Lord HARDWICKE in *Ex parte Barnsley* (3 *Atk.* 169, *A. D.* 1744), decided that, although there might be mental incapacity in a party, still no return to the inquisition would be good which did not find the party of unsound mind. And the ground upon which he rested this ruling was, that while he was desirous of maintaining the prerogative of the crown in its just and proper limits, yet, at the same time, he must take care not to make a precedent of extending the authority of the crown so as to restrain the liberty of the subject and his power over his own person and estate, further than the law would allow.

In our own State Chancellor KENT gave an early assent to the doctrine announced in the English decisions. And on a similar question coming before him, in the case of Barker (2 *Johns Ch.* 233), gave his entire approbation to the course pursued by Lords ELDON and ERSKINE. Barker was not a lunatic, nor yet an idiot, but a feeble minded old man, incapacitated by advanced age for the management of his own affairs. A commission was accordingly issued and a finding of unsound mind returned. In referring to the duty of courts of equity to issue commissions in the nature of writs *de lunatico*, wherever there was a reasonable doubt of a party's capacity to manage his own affairs, the chancellor, while reviewing the English authorities, said :

"Lord HARDWICKE disclaimed any jurisdiction over the case of mere weakness of mind, yet it is certain that when a person becomes mentally disabled from whatever cause the disability may arise, whether from sickness, vice, casualty, or old age, he is equally a fit and necessary object of guardianship and protection. The Court of Chancery is the constitutional and appropriate tribunal to take care of those who are incompetent to take care of themselves. There would be a deplorable failure of justice without such a power. The object is protection to the helpless, and the imbecility of extreme old age, when the powers of memory

and judgment have become extinct, seems, as much as the helplessness of infancy, to be within the reason and necessity of the trust."

And proceeding further to justify the issuing of commissions in cases of general mental incapacity without the presence of actual insanity, he observed: "It is evident that Barker is not a lunatic, within the legal meaning of the term. He is not a person who sometimes has understanding and sometimes not. He is rather of that class described by Lord COKE as *non compos mentis*." (*Co. Litt.*, 246, b.)

An inquisition may, therefore, be awarded for any cause which substantially incapacitates a party to manage his affairs. It matters not, therefore, whether the party be reduced to this condition by disease, or old age, or habitual intoxication. (*Ex parte Tracy*, 1 *Paige*, 580.)

Any thing which reduces the mental capacity of an individual to such a degree as to permanently unfit him to comprehend the nature and necessities of his own affairs; to take in the position which those affairs occupy to others, and the provision necessary to be made to secure himself against the ordinary risks and contingencies of business, may be said to render him, in contemplation of law, unfit to manage his affairs. Although not properly a lunatic, he is still in the eye of the law *non compos mentis*, and a proper subject for an inquisition of lunacy.

However probable may be the existence of the fact of lunacy, it must still be sufficiently well substantiated to satisfy the judgment of the court to which application for a commission is made, since the court cannot act on conjecture alone. Therefore in *Sherwood v. Sanderson* (19 *Ves.* 286), Lord ELDON observed that "before a commission issues, the duty of that person who has authority to issue it, requires him to have evidence that the object of the commission is of unsound mind and incapable of managing his affairs and

for that purpose the evidence of medical men is generally produced."

But it is not every case of mental weakness or imbecility which will authorize a court of equity to exercise the power of appointing a committee of the person and estate. In order to justify the exercise of such a power it has been held that the mind of the individual must be so far impaired as to be reduced to a state which, as an original incapacity, would have constituted a case of idiocy. (*Matter of Morgan*, 7 Paige, 236; *Matter of Shaul*, 40 How. Pr. 204.) Although there certainly are degrees in idiocy, it is doubtful whether the standard thus selected, as popularly understood, is not a lower one than courts could generally, or even safely, adopt in exercising guardianship over the feeble-minded. Every day furnishes evidence of the existence of certain minds which, far above idiocy in intensity and extensity of power, are yet shown by experience to be incapable of governing themselves or managing their affairs. Without being idiots, they are still capable of being included among the *non compos* class. It was to this feeble class that Lord HARDWICKE referred, when he observed that it might be well if a curator or tutor should be set over prodigal and weak persons as in the civil law. (*Ex parte Barnsley*, 3 Atk. 169.)

ISSUING THE COMMISSION.

When a case appears *prima facie* to be one of idiocy, lunacy, unsoundness of mind, or habitual drunkenness, the court will, in general, grant the application for a commission, though it is not by law compelled to do so. (2 Barb. Ch. Pr. 229.) In *Ex parte Tomlinson* (1 Ves. & Bea. 57) Lord ELDON observed that the court was not bound to issue a commission of lunacy merely because the fact of lunacy was established. That matter was in the discretion of the court, and to be regulated alone by the benefit to the lunatic, with reference to the care of his person

and property, but not of course. In saying this he evidently meant that there were cases of well-established lunacy where the expense of a commission was not warranted by the value of the estate to be protected.

If the alleged lunatic be a non-resident of the State having property here, the petitioner must establish this fact by proof, since it will not be sufficient to allege it in affidavits annexed to the petition. Without such proof there is nothing on which a court can found its jurisdiction. (*Matter of Neally*, 26 How. Pr. 402.)

Upon an order being granted and filed with the clerk of the court, the commission will then issue. The commission should be previously prepared according to the required form, and handed to the clerk to be endorsed and sealed. Three persons are usually named in it, of whom one should be a counselor of the court, and one a physician. The technical inquiries as to the lunacy, the value of the real and personal estate of the lunatic, and the annual rents and profits of the same, and who are his relatives, are legal questions to be passed upon by the jury, and none of them consequently must be omitted in the commission.

The execution of the commission must be public and openly, as in case of any issue tried by jury. Hence it has been held that a person proceeded against as a lunatic, except in cases of confirmed and dangerous madness, is entitled to reasonable notice of the time and place of executing the commission, and a reasonable time within which to produce his witnesses. And in order to compel their attendance he is entitled to *subpœnas* from the commissioners, as any other defendant. A neglect or refusal on their part to issue them will invalidate their proceedings. (*Ex parte Plank*, 3 Am. L. J. 518; *Ex parte Lincoln*, 1 Brewst. 392.) Nor is this rule suspended in the case of non-residents. (*Matter of Pettit*, 2 Paige, 174.) But it is not necessary that notice should be served on him per-

sonally when it is evident that he keeps out of the way to avoid service. And should any circumstances be present which afford a satisfactory reason for not serving such notice upon him, they should be stated in the petition so that the court may authorize a suspension of the rule in the commission itself. (*Matter of Tracy*, 1 *Paige*, 580.)

PLACE OF EXECUTING COMMISSION.

The fact of lunacy may be ascertained wherever most convenient to the parties concerned. And it is immaterial for this purpose whether the alleged lunatic be an actual resident or not of the State. Provided only he have property within the jurisdiction of the court, its process may issue. (*Ex parte Southcote*, 2 *Ves., Sr.*, 401; *Ex parte Baker*, 19 *Ves.* 340.) Where, therefore, a lunatic having property in this State was domiciled in an adjoining one, the court authorized the commission to be executed in the neighboring county which was most convenient and nearest the lunatic's residence. (*Matter of Pettit*, 2 *Paige*, 174; *Matter of Perkins*, 2 *Johns. Ch.* 124.)

POWERS AND DUTIES OF COMMISSIONERS.

The commissioners are empowered to issue subpoenas, and may, in case of necessity, obtain attachments to compel the attendance of witnesses. They may also issue a precept to the sheriff requiring him to summon a jury of not less than twelve, nor more than twenty-four good and lawful men of the county, to come before them at a certain time and place mentioned therein, for the purposes named in the commission. They may also compel the production of the lunatic before them for their inspection and that of the jury, if deemed desirable, and this, in all cases wherever possible, should be done. (2 *Barb. Ch. Pr.* 233; *Matter of Russell*, 1 *Barb. Ch. R.* 38.) Should any custodian of the lunatic or other person interpose to prevent this inspection he may be punished. Thus, in Lord Wenman's case, his wife, who

was an Irish peeress, and had charge of his person, was committed for contempt for not producing him when required, (1 *P. Wms.* 701), or if the persons having charge of the lunatic carry him out of the State, the commission may still be executed in his absence. (*Ex parte Halse*, 2 *Ves., Sr.*, 405.)

So, also, the commissioners must act with judicial impartiality, and in no way interfere with the course of procedure in selecting a jury. Hence upon the execution of a commission *de lunatico*, it is the duty of the sheriff alone to select and to summon the jurors, and it is both improper and irregular for the commissioners to dictate what persons are to be summoned. (*Matter of Wager*, 6 *Paige*, 11.)

No statute requires that the commissioners should be sworn, the order granting the commission giving them plenary authority to act without taking any preliminary oath of office.

In conducting the trial it is usual for the person first named upon the commission to act as president, to administer the oath to the jury; to read and explain the commission to them; to swear and examine the witnesses, who must testify both as to the lunacy of the party, his next of kin, and the value of his real and personal property. And some one of the commissioners should also charge and instruct the jury as to the matters to be found by them in their verdict. (2 *Barb. Ch. Pr.* 233.)

In the case cited below, Chancellor WALWORTH, in directing the manner in which the jury should be charged, says, "but without argument of counsel on either side." Now since it was always a settled rule of practice in our Court of Chancery, that any party against whom a commission of lunacy was awarded could be represented by counsel (1 *Moulton's Ch. Pr.* 110), we know of no principle of law which would authorize the commissioners to refuse permission to such counsel to address the jury. For it might become a very essential part of his duty to enlighten the

jury upon the value or significance of the evidence introduced, and we do not well see, how, without great injustice to the parties interested, any counsel could legally be restricted to the examination of witnesses alone. Such a restriction has certainly never existed in England, and the question, therefore, has never called for special adjudication. Nor if raised before any of our courts do we believe it would receive any countenance.

In the *Matter of Arnhout* (1 *Paige*, 497), Chancellor WALWORTH laid down the following as the rules to be observed by the commissioners in charging the jury, viz.: The jury are to be instructed that, if twelve or more of them find that the party is not incompetent, they are to deliver their verdict accordingly, or if the same number decide against his competency, that they then find and determine the other facts directed to be inquired of, and that if twelve of them cannot agree either way, they report the fact to the commissioners in order that their return be made accordingly. And in relation to every legal question arising in the execution of the commission a majority of the commissioners must decide.

DUTY OF SHERIFF.

The duty of the sheriff in executing the precept of the commissioners is to select and summon the jurors to attend at the time and place named therein, and without suggestions from any one, not even the commissioners, as to the persons to be selected; to attend the inquisition in person, yet not to remain in the room with the jury during their deliberations. (*Matter of Wager*, 6 *Paige*, 11.)

When once the jury are sworn, although the number may be larger than is necessary for a legal inquisition, no one can be withdrawn without impairing the validity of the proceedings. (*Tebout's Case*, 9 Abb. 211.)

And if any challenges to jurors are made, it is for the commissioners to decide upon their validity. (*Matter of Wager*, 6 *Paige*, 11.)

INQUISITION.

An inquisition or inquest of office at common law was an inquiry made by the King's officer, being either a sheriff, coroner, or escheator *virtute officii*, or by commissioners specially appointed, concerning any matter relating to the King's revenues. It was in the nature of a suit brought by the King to establish his title by proof of the facts upon which his title depends. The object of an office was to provide a remedy for enforcing the right. (*Tomlyn's Dict., Inquest; Co. Litt.* 310, b.) Under the statute 32 Henry VIII, ch. 46, the court of Wards and Liveries was established to superintend and regulate these inquiries. The abolition of this court at the restoration and the substitution of commissions in the nature of writs of inquiry long ago changed the whole significance of this method of procedure in England. In our own country the old doctrine of inquest of office in relation to real property has only come up for adjudication in a few cases of alienage, but has been so modified by treaties, acts of Congress and statutes, as to be seldom alluded to now. (*Fairfax v. Hunter's Lessee*, 7 Cranch; *U. S. v. Repentigny*, 5 Wall. 211.) The subject is now generally merged in that of Escheats, as provided for by statute. (*Johnson v. Hart*, 3 Johns. Cas. 322.)

In the execution, however, of commissions of lunacy, the inquisition or inquest of office retains its usual significance. It is still a proceeding tending to the forfeiture of civil rights over one's person and property, dependent upon the degree of mental incapacity established. Its effects are legally tantamount to an office found for the State, with this condition that, upon a restoration to reason, of the party once insane, he may have a supersedeas, and resume the control of his property. The forfeiture although continuous with the insanity is not, therefore, an absolute one. No change in this respect has been made in the trust assumed by the State, through its courts, in the estate of a lunatic, since the

statute 17 Edw. 2. Its spirit still animates *mutatis mutandis*, our jurisprudence.

The usual manner of holding an inquisition of lunacy is this:

The commissioners, sheriff and jurors, together with the witnesses, being assembled at the place and time appointed, counsel in behalf of the commission and of the lunatic may also be present. The trial thereupon proceeds, with or without the presence of the lunatic, as the case may be. But the commissioners and the jury may demand a view of and question the lunatic, and as before shown may compel the person having him in custody to produce him. If a previous order for this purpose has not been issued, and if, on the order so given, the lunatic, if able to be removed (if not, the jury or some of them may visit the lunatic and report to the rest), is not produced, the commissioners should return the fact to the court whereupon an attachment will issue against such parties as for a contempt, with costs. (1 *Moulton's Ch. Pr.* 110; 1 *Grant*, 204; *Ex parte Southcote*, 2 *Ves., Sr.*, 401; *S. C., Ambl.* 111; *Lord Wenman's case*, 1 *P. Wms.* 701; *Matter of Russell*, 1 *Barb. Ch. R.* 38.)

The alleged lunatic may always be present if he pleases. It is a privilege, from which he cannot be excluded without invalidating the proceedings. (*Ex parte Cranmer*, 12 *Ves.* 445; *Ex parte Russell*, 1 *Barb. Ch. R.* 38; *Hinchman v. Richie*, *Bright.* 181; *Ex parte Lincoln*, 1 *Brewst.* 392.) The witnesses are then examined first as to the lunatic; next as to the value of the real and personal property of the lunatic, and lastly as to who are his next of kin. Counsel may then be heard on either side, and the jury having been duly charged by one of the commissioners as to the matters to be determined by their finding, thereupon retire to deliberate by themselves. It is illegal for any one, even the sheriff, to be present at such time. (*Matter of Arnhout*, 1 *Paige*, 498.) The jury having deliberated upon the matter of inquiry, the inquisition which has previously been pre-

pared with blanks is read to them, and they direct in what way these blanks are to be filled. The commissioners and jury then sign and seal the inquisition, which, when executed, should be a full response and return to the commission, in relation to all matters therein to be inquired of. The inquisition is thereupon annexed to the commission, with the following return, viz.: "The execution of this commission appears in the schedule hereunto annexed," and the whole should be filed in the office of the county clerk. (1 *Moulton's Ch. Pr.* 111; 2 *Barb. Ch. Pr.* 233.)

It is the usual practice on the return of a commission to move for an order confirming the same, upon reading the commission, return and inquisition. But the commission may be quashed and a new one directed, in case of misconduct, or apparent insufficiency of the return; or a motion may be made for leave to traverse the same by any party aggrieved. And whenever any finding is to be contested, the court will direct notice to be given to the other party, so that as many of these applications as can, may be heard together. (*Matter of Christie*, 5 *Paige*, 242.) Under such circumstances the first order granted may be one directing that the lunatic be brought into court for inspection, and if the court be not satisfied, the next order may award an issue at law to be made up under the direction of the court and conducted as directed; and a provisional order may, meanwhile, be made for the care of the lunatic's estate, until the fact of the lunacy be decided by a verdict. The proceedings on the feigned issue and on return of verdict being as above directed, if no new trial or appeal interpose any further obstacles, the petition for the appointment of a committee which had been prepared and presented on the return of the commission and inquisition may then be acted upon. (1 *Moulton's Ch. Pr.* 111.)

NEW COMMISSION.

It being entirely within the discretion of the court to confirm or not the finding of an inquisition, it follows that such

a proceeding may be set aside whenever it is found to have been either irregular in its execution, in violation of the statute, or whenever again the verdict is plainly against evidence.

Thus an inquisition has been set aside because the alleged lunatic had no notice given him of its occurrence (*Matter of Tracy*, 1 *Paige*, 581); because a stranger was appointed committee without the assent of the relatives of the lunatic and without a reference (*Lamoree's case*, 11 *Abb.* 274; *S. C.*, 32 *Barb.* 122, and 19 *How. Pr.* 375); because the commissioners directed the sheriff to summon certain persons as jurors (*Matter of Wager*, 6 *Paige*, 11); because the sheriff entered the room where the jury were deliberating upon their verdict and conversed with them (*Matter of Arnhout*, 1 *Paige*, 498); because the inquisition did not, in its return, conform to the statute, and find the party an idiot, lunatic or person of unsound mind (*Matter of Morgan*, 7 *Paige*, 236; but see *Matter of Mason*, 1 *Barb. S. C.* 436); or because the commissioners refused to issue subpœnas in behalf of the alleged lunatic (*Ex parte Plank*, 3 *Am. L. J.* 518). An inquisition may also be set aside upon the personal examination of the lunatic by the court, and of the evidence adduced upon the trial, showing that the jury erred in finding their verdict. But in such case the introduction of new evidence, where no valid reason can be shown why the same was not produced upon the trial, will not be permitted *ex parte* to contradict the verdict, unless there has been gross error or undue prejudice exhibited on the part of the jury. (*Matter of Russell*, 1 *Barb. Ch. R.* 38; *Matter of Tebout*, 9 *Abb.* 211.)

But a mis-nomer merely of the lunatic in the inquisition and other proceedings will not of itself invalidate them. For it may be corrected by an order entering such correction into future documents in which such lunatic's name is mentioned, the only point to be considered being the estab-

lishment of his identity. (*In re Crawford*, 1 *Myl. & Cr.* 240.)

The death or incapacity of one of the commissioners will render it necessary to suspend the execution of the commission, and to issue a new one. (*Shelford*, p. 83, 1st ed.)

Where the inquisition and proceedings have been set aside for any cause, a second commission cannot be issued on the original petition, because the continuance of the reasons upon which the first was based cannot be presumed at law, but must be proved *de novo*. (*Hinchman v. Richie, Bright*, 144, 182.)

FEES OF COMMISSIONERS.

On the execution of a commission of lunacy, etc., the commissioners, for every day they are necessarily employed in hearing the testimony and taking the inquisition, shall be entitled to an allowance to be fixed by the court. The committee of a lunatic, idiot, or drunkard, may pay to the petitioner on whose application the commission was issued, or to his attorney, the costs and expenses of the application, and of the subsequent proceedings thereon, including the appointment of the committee, and without an order of the court for the payment thereof, when the bill of such costs and expenses has been duly taxed and filed with the clerk in whose office the appointment of such committee is entered, provided the whole amount of such costs and expenses does not exceed fifty dollars. But where the costs and expenses exceed fifty dollars, the committee shall not be at liberty to pay the same without a special order of the court directing such payment. (*Supreme Court Rules*, No. 77; *Matter of Clapp*, 20 *How. Pr.* 385.)

And when no attorney is employed they are entitled to the same fees that he would be for the same services rendered. As to attorneys' fees in such cases, see (3 *R. S.*

529, 902) *Code of Pr.*, § 307. (*Brockway v. Jewett*, 16 Barb.)

Fees of jurors. The jurors sworn upon any inquest of office are each entitled to twelve and a half cents. (3 R. S. 912.)

The prosecutor of a charge of lunacy, if the same be made in good faith, will not be compelled to pay costs, even though the inquisition fail to establish the fact charged. (*Brower v. Fisher*, 4 Johns. Ch. 440.)

It has also been held that a solicitor has no legal claim against a lunatic for opposing unsuccessfully a commission against him. But the court may, in its discretion, allow him costs where the fact of the lunacy was so much in doubt that the chancellor, if applied to, would have directed such opposition upon the execution of the commission. (*Matter of Conklin*, 8 Paige, 450.)

TITLE THIRD.

INQUEST OF OFFICE AND ITS EFFECTS.

There are *three* forms of finding to a commission of lunacy, one of which must always be returned in the verdict of the jury, namely: *Idiocy, lunacy or unsoundness of mind*. Whatever, therefore, may be the views entertained by the jury as to whether the individual exactly corresponds to this or that class-type of mental disorder, they must, nevertheless, come to some definite conclusion. For all practical purposes it may be said that there are but two general classes of mental impairment at law, the first being idiocy, which implies arrest of development from birth; the second being known as unsoundness of mind, which includes every form of lunacy or mental infirmity to whatever cause due, exhibiting itself in a mind of previous

ordinary power. The legal phrase *non compos mentis* covers all forms of mental impairment. It is a term of precise definition. But imbecility, which may attain to idiocy, on the one hand, or remain localized within the limits of mental infancy on the other, is not a term of definition at law. It describes, therefore, no class to which any fixed standard of mental power can be applied.

In cases of idiocy no time of beginning need be stated in the return of the inquisition, for idiocy implies at law mental incapacity from birth. (*Prodgers v. Frazier*, 3 Mod. 43; *Lord Donegal's Case*, 2 Ves., Sr., 408.)

But in cases of lunacy or unsoundness of mind, the return should state definitely from what time the disorder began, since the inquisition may thus overreach acts which the lunatic has performed affecting his property, and over which the court can, therefore, extend its equitable protection. (*Shelford*, p. 116.) *In re Whittaker* (4 My. & Cr. 441) Lord COTTENHAM said that the law required and the jury were bound to ascertain the period at which the lunacy began.

It is usual, also, to state in a return of lunacy whether the party is with or without lucid intervals. And although it has been held in England that the omission to do so will not invalidate a finding (*Ex parte Barnsley*, 3 Atk. 168; *Ex parte Ferne*, 5 Ves. 450), because there any party whose rights of action or title are overreached by the inquisition may have his traverse yet in this State, where such is not a matter of course, every reason on which the value of a lucid interval at law rests, demands that so important a fact should be made part of the inquisition, and necessarily also of the finding. The rights of *bona fide* purchasers or creditors are entitled to the same protection from a court of equity as are the interests of the lunatic. And if this be so, then we are logically brought to the conclusion that any finding which does not state whether the lunatic is with, or

without, lucid intervals should be deemed invalid for want of definiteness.

As in the writs *de idiota inquirendo* and *de lunatico inquirendo*, the jury are instructed as to what matters they are to inquire of, the issue always arising upon a suggestion whether a certain party be or not an idiot or a lunatic, so the finding must be consistent with the commission and follow in the same words, or in words to the same effect. Hence it has been held that a court of equity cannot acquire any authority over the person or estate of a lunatic or person of unsound mind, unless the verdict be couched in legal terms. And that if any special verdict, qualifying by its terms the express scope of the issue involved, be returned, the court cannot receive it. (*Ex parte Cranmer*, 12 Ves. 449.)

This rule was early re-affirmed by our courts, and in Barker's case, before cited, it was held that the jury must find in so many words, that "the party is of unsound mind and mentally incapable of managing his affairs." A further endorsement of the same doctrine was made by Chancellor WALWORTH in a leading case, that of *Ex parte Morgan* (7 Paige, 236); there a commission, in the nature of a writ *de lunatico*, directed the jury to inquire whether Morgan, who was alleged to be of unsound mind, was a lunatic, an idiot or of unsound mind and mentally incapable of governing himself and managing his affairs. The finding of the jury was that "he was incapable of governing himself and of managing his affairs in consequence of mental imbecility and weakness." The court refused to accept the return and to appoint a committee, on the ground that the jury must distinctly find that the party was of *unsound mind* as well as mentally incapable of governing himself or managing his affairs. In this ruling he was fully sustained by the course pursued in the English courts where inquisitions have been quashed with returns finding a person "not sufficient to manage his person and estate" (*Ex parte Read*, 1 Atk. 160);

“not of sufficient understanding to manage her own affairs” (*Ex parte Harvey*, 3 *Atk.* 169); “not a lunatic, but incapable” (*Ex parte Ashton*, 3 *Atk.* 169); “not a lunatic, yet not proper to take care of his affairs during his fits” (*Ex parte Halse*, 2 *Ves., Sen.*, 405, and 3 *Atk.* 173); “worn out with age and incapable of managing her own affairs” (*Wall's case*, 3 *Atk.* 173; *Shelford*, p. 138).

And in Pennsylvania it has been held that a finding that a party “by reason of old age and long continued sickness has become so far deprived of reason and understanding as to be wholly unfit to manage his estate” is not sufficient to constitute him in the eye of the law *non compos mentis*. (*Ex parte Beaumont*, 1 *Wh.* 52; *McElroy's case*, 6 *W. & S.* 451; *Comm. v. Schneider*, 59 *Penn. St.* 328.)

But where a person has been found “a habitual drunkard,” it is not necessary to say that he is incapable of managing his affairs, for that is implied in the finding. (*Ludwick v. Comm.*, 18 *Penn. St.* 172; *Matter of Hoag*, 7 *Paige*, 312.)

It has indeed been doubted whether the terms “unsound mind” were indispensable to the exactness of a finding, it being assumed that by implication such a condition is always pre-supposed. Thus in *Ex parte Mason* (1 *Barb. S. C.* 436) it was held that inasmuch as the statute gives the care and custody of lunatics to the Supreme Court, without any restrictions or limitations, leaving the manner of exercising that power to its discretion, it was enough, if there appeared upon the return of the inquisition sufficient reason to adjudge the party to be within some one of the classes of persons over whom the court has jurisdiction. It was sufficient, therefore, if the jury found the party incapable of governing himself or managing his own affairs. Nevertheless that it seemed better to adhere to the technical form of the finding in the language of the statute itself.

And there being no right to traverse an inquisition, no

particular form need to be given to the finding. But although there is authority to believe that Chancellor KENT, in the *Matter of Barker* (2 Johns. Ch. 232), understood the term "mentally incapable" as synonymous with "unsound mind," yet looking at the logical order of thought exhibited in the finding always required in England, it will be found that the words "mentally incapable" only describe a present and possibly temporary condition without reference to any antecedent and underlying cause, while the terms "unsound mind" describe a permanent, established condition, and show a good reason why the party is "mentally incapable of managing his affairs." Hence, it was said by Chancellor WALWORTH that without such finding the court would have no power of appointing a committee, since it was not every case of mental weakness or imbecility that would authorize such action. (*Ex parte Morgan*, 7 Paige, 236.)

The finding of a verdict which supports the inquisition establishes to that extent the fact of lunacy, and the party is thereby placed under civil disability as to the right to enter into any contract, except for necessities.

It will thus be seen that the authorities both here and in England concur in requiring the jury to find some distinct and established impairment of mind such as may be included in the terms *non compos mentis*, as a *sine qua non* to giving the court jurisdiction over the person and estate of the party. This is an indispensable condition precedent to the exercise of any authority in the matter of appointing a committee. And courts cannot, therefore, avoid quashing inquisitions whenever the finding does not return the essential facts called for in the writ. There is no middle ground on which the return can stand, for the jury must find the party either of sound or unsound mind. Nor must they leave it to the court to draw conclusions from premises of their own, since they are the triers selected to determine the issue, and are sworn to find some definite verdict. (*Matter of Mason*, 3 Edw. Ch. 380.)

But whenever a party has been found upon the return of an inquisition to be either an idiot, a lunatic, or a person of unsound mind, the court confirming the verdict immediately acquires jurisdiction over his person and estate (*Matter of Clapp*, 20 *How. Pr.* 385); and an inquisition being in the nature of a proceeding *in rem*, this finding is constructive notice to the world of the party's incapacity to incur any legal obligation. (*Wadsworth v. Sharpsteen*, 8 *N. Y.* 388; *Griswold v. Miller*, 15 *Barb.* 520.) Accordingly, such an individual is regarded at law as if civilly dead, and any acts thereafter performed by him are treated as nullities. Even though such acts should enure to the benefit of the *non compos*, his committee cannot, without the authority and direction of the court, ratify them. So long, therefore, as the commission remains unrevoked the *non compos* can do no valid act, the existence of the commission being conclusive of its invalidity. (*Matter of Patterson*, 4 *How. Pr.* 34.)

Although these are settled doctrines, there has nevertheless been much conflict of opinion as to whether an inquisition overreaching retrospectively certain acts performed by the lunatic, should be treated as conclusive or only as presumptive evidence of mental incapacity.

Thus in *Hart v. Deamer* (6 *Wend.* 497), which arose upon an issue to determine whether the defendant was a lunatic at the time he executed a certain bond, an inquisition *de lunatico* finding that he was a lunatic at that time and without lucid intervals, it was held by SAVAGE, C. J., that the inquisition was admissible as *prima facie*, but not as conclusive evidence. The court referred with approbation to *Sergeason v. Sealey* (2 *Atk.* 412), where Lord HARDWICKE, in admitting an inquisition as evidence, allowed witnesses to contradict it, saying that it was not conclusive. The application there was to set aside a purchase made after the time covered by the inquisition of lunacy. Certainly since an inquisition in England can always be traversed as

matter of right, it renders the finding *prima facie* evidence only, for it might be nullified by a traverse jury. The doctrine received fresh confirmation from Lord ELLENBOROUGH in *Farlan v. Silk, Exr., etc.*, (3 *Campb.* 126), where an inquisition was received in an action of debt on a bond, it being held admissible, but not conclusive.

In *Fitzhugh v. Wilcox* (12 *Barb.* 235), it was held that any contract made with a lunatic after office found was absolutely void; that the committee could bring no action upon it nor ratify it by any act of his own without consent of the court. And JOHNSON, J., observed that the distinction between the void and voidable contracts of a lunatic did not appear to be settled upon authority, but that it would be found to be substantially this, that the deeds and contracts of a lunatic made before office found are not void, but voidable, while those made afterward are absolutely void. (*Jackson v. Gumaer*, 3 *Cowen*, 552; *Pearl v. McDowell*, 3 *J. J. Marsh.* 658; *Waite v. Maxwell*, 5 *Pick.* 217.)

In the *Matter of Patterson* (4 *How. Pr.* 34) it was held that as to acts done by a lunatic or habitual drunkard before the issuing of a commission, and which are overreached by the retrospective finding of the jury, an inquisition is only presumptive and not conclusive evidence of incapacity.

In *Wadsworth v. Sharpsteen* (14 *Barb.* 169, *affirmed in* 8 *N. Y.* 388) all the judges, with the exception of WILLARD, who gave a dissenting opinion, concurred in regarding the return of an inquisition as conclusive evidence of incapacity. (See, also, *Matter of Clapp*, 20. *How. Pr.* 385; *Demilt v. Leonard*, 11 *Abb.* 252.)

In a late case, that of *Van Deusen v. Sweet* (51 *N. Y.* 378), the current of opinion was again changed, so as to reverse the doctrine laid down in *Wadsworth v. Sharpsteen*, and it was there held that an inquisition is only presumptive and not conclusive evidence of incapacity. If

the same court has thus had occasion to differ so widely in its opinions upon the same subject at different times, it is plain that there must have been some cardinal omission at the outset in giving sufficient definiteness to the finding of the jury to exclude all presumption of lucid intervals. And it is but a confirmation of the reason heretofore given by us for questioning the validity of any finding in lunacy, in which the jury do not expressly declare whether the lunatic is with, or without lucid intervals. Legally considered, every form of lunacy implies the possibility of an intercurrent lucid interval, and until that possibility is judicially declared never to have borne fruit, the only proper inference is that it may have done so, and consequently that an inquisition which overlooks the question of lucid intervals is only presumptive and not conclusive evidence of past continuous incapacity. (*Searles v. Harvey*, 6 *Hun*, 658.)

The rule is now settled in this State that on a bill filed to set aside a conveyance or to nullify any act on the ground of the lunacy of the party at the time he executed the same, the finding of a jury on an inquisition which overreached that period is only presumptive and not conclusive evidence of his incapacity. And in a leading case whose authority has never been questioned, Chancellor WALWORTH stated the legal effects of an inquisition of lunacy upon the past acts of a party found insane at that time, in the following words, viz.: "As to acts done by a lunatic or drunkard, before the issuing of the commission, and which are overreached by the retrospective finding of the jury, the inquisition is only presumptive, but not conclusive, evidence of incapacity. But all gifts of the goods and chattels of the idiot, lunatic or drunkard, and all bonds or other contracts made by him after the actual finding of the inquisition declaring his incompetency, and until he is permitted to assume the control of his property by the court, are utterly void." (*L'Amoureux v. Crosby*, 2 *Paige*, 427; *Frank v.*

Mainwaring, 2 *Beav.* 115; *Osterhout v. Shoemaker*, 3 *Hill*, 516; *Hart v. Deamer*, 6 *Wend.* 497; *Hoyt v. Adees*, 3 *Lans.* 173; *Goodell v. Harrington*, 3 *T. & C.* 345; *Demilt v. Leonard*, 19 *How.* 141.) Our courts have also held that jurisdiction over the property of an alleged lunatic was acquired by them simultaneously with the issuing of a commission. Under such a rule a party may be enjoined from disposing of his property *pendente lite*. And where a party purchased property of one with full knowledge of the issuing of a commission *de lunatico* against him, and while the sheriff was summoning the jury to try the issue, it was held that his title to the same could not be allowed to stand, being a fraud upon the proceedings of the court which had already acquired jurisdiction over the property. (*Griswold v. Miller*, 15 *Barb. S. C.* 520.)

TITLE FOURTH.

TRAVERSE.

Inquisitions of lunacy in England being in the nature of proceedings for forfeitures to the Crown, the right to traverse the same as matter of appeal, was granted by statute in very early times. (*Ex parte Cuming*, 1 *De G. M. & G.* 537). And the same privilege is secured by statute in Pennsylvania. (13 *June*, 1836, § 12, *P. L.* 595. There, on the trial, the commencement and conclusion are with the Commonwealth. (*Comm. v. Haskell*, 2 *Brewst.* 491.) But in New York a traverse is not a matter of right. It rests exclusively in the discretion of the court, and instead of a formal traverse the practice has been to award a feigned issue. (*Matter of Tracy*, 1 *Paige*, 580; *Matter of Russell*, 1 *Barb. Ch.* 38.) In the case of habitual drunkards, however, where the proceedings upon inquisition to deter-

mine the question of their mental incapacity are similar to those in lunacy, it has been held proper in cases of doubt to grant such an issue for the purpose of informing the conscience of the court. (*Willard's Eq. Jur.* 683.) And considering the nature of a state of mind so largely under the control of the sufferer himself, it is but just, before adjudging him to be *non compos*, to remove every lingering doubt upon the subject, since chronic inebriety is not necessarily a proof of insanity, and the latter must be established by evidence *aliunde*. (*Matter of Janes*, 30 *How. Pr.* 446.) Even if the court is still doubtful, a traverse may be granted as matter of right in England under the statute 2 Edw. 6th, ch. 8, § 6 (8 *Coke*, 168; 4 *Ib.* 54, *b*; *Shower*, 199.)

At common law the right of traversing an inquisition did not exist, and the party aggrieved was put to his petition of right. This remedy having been found inconvenient, the statute of 34th Edw. 3d, ch. 14th, was enacted, providing that in certain cases, after the return of the office into Chancery, the party aggrieved might traverse the office in Chancery and the process was directed to be sent into the King's Bench, to be tried according to law. (*Shelford*, *p.* 143; *Ex parte Gwydir*, 4 *Madd.* 322; *In re Sadler*, 1 *Ib.* 581.) Finally the statute of 2d and 3d Edw. 6th, ch. 8, § 6, enacted that "If any person be, or shall be untruly founden lunatic, idiot or dead. Be it enacted by the authority aforesaid, that every person and persons grieved or to be grieved by any such office or inquisition shall, and may have his or her traverse to the same immediately or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse, upon untrue inquisitions or offices founden; any law, usage or custom to the contrary in any wise notwithstanding." (1 *Evans' Stat.* 129). The above statute remained in force and unamended for three hundred years, when in the reign of George IV (6th *Geo.* 4th, ch. 53, *A. D.* 1825), an act was passed "for limiting the time within which inquisitions

of lunacy, idiocy and *non compos mentis* may be traversed and for making other regulations in the proceedings pending a traverse." By this act the time within which a traverse could be brought was limited to three calendar months, to be computed from the day of the return of the inquisition.

The court, however, never loses its jurisdiction of the case, and even after a traverse jury have found a similar verdict to that of the original inquisition, the power of reviewing the same still remains. The whole matter may be disposed of upon its merits, and should the verdict be unsatisfactory, it may be set aside and the proceedings dismissed. (*Matter of Shaul*, 40 *How. Pr.* 204.)

Thus upon the return of any finding in lunacy the court may, within its discretion, discharge the inquisition upon a mere examination of the alleged lunatic in connection with the evidence produced before the jury, and that too, without subjecting him to the expenses incidental to an issue, or a traverse, where, upon such examination and evidence, it is made manifest that the jury have erred. There must be some change in the situation of the lunatic to justify it, and it must be sufficient to show that the finding was the result either of mistake or of prejudice. But no inquisition will be discharged upon *ex parte* affidavits, contradicting the finding of the jury, unless good reasons be shown for neglecting to produce the deponents as witnesses before the commissioners. (*Matter of Russell*, 1 *Barb. Ch.* 38.)

Inquisitions as anciently conducted by the escheators appointed by the Crown gave rise to many grievances. Proceedings under inquisitions of any kind, being in the nature of claims for forfeitures to the sovereign, it became necessary to give protection to the subject by allowing him the right of a traverse. For after office found, a person traversing the inquisition was considered in the nature of a defendant opposing the title established in the Crown. This was

the evident cause of the passage of the statute of 2d and 3d *Edw.* 6th.

Lord THURLOW, *In re Fust* (1 *Cox*, 418), thought that the granting or withholding a traverse was still matter of discretion with the court, but later authorities seem to concur in the opinion that a traverse to the return of an inquisition by one found *non compos* is a right by law. (*Ex parte Ferne*, 5 *Ves.* 450; *Ex parte Wragg*, 5 *Ib.* 832; *Ex parte Ward*, 6 *Ib.* 579; *Ex parte Cranmer*, 12 *Ib.* 449; *Sherwood v. Sanderson*, 19 *Ib.* 287; *Shelford*, 148.)

It is hardly necessary to say that no reasons have ever existed in our midst for the passage of any such statute as that of Edward VI. The abuse of the prerogative of the Crown in the matter of forfeitures, against which the right of a traverse was given to the subject as a protection, finds no analogy here. The people as its successors acquire no rights of property in the lands of idiots, or in those of lunatics. Even the term "office found" has practically no significance here so far as conveying any title to the State in the real or personal property of persons of unsound mind. Therefore the right of traverse does not exist as in England, and our courts still hold to the doctrine, that it is within their sole discretion to grant or to refuse leave. And whenever they allow it they retain the right to direct the course of proceedings in such manner as to them may seem most useful and expedient, and so as to afford the safest conclusions as to the existence of the fact of lunacy.

Thus the lunatic may be brought into court and an inquiry made, by inspection, after the inquisition is returned, as was declared in *Helv's case* (3 *Atk.* 634), and in the case of returning sanity this is frequently the course, aided also by affidavits and the certificates of physicians. An issue may also be awarded to ascertain by a verdict at law the existence or continuance of the lunacy, as was done in the case of *Ex parte Holyland* (11 *Ves.* 10). This seems the preferable course and was the one adopted by Chancellor

KENT in the *Matter of Wendell*, where, upon leave being granted to traverse the return of an inquisition, he directed an issue to be made up and tried at the next circuit. (1 *Johns. Ch.* 600.) And should the traverse of the inquisition prove groundless it will subject the mover thereof to costs. (*Matter of Folger*, 4 *Johns. Ch.* 169.) In the *Matter of McLean* (6 *Ib.* 440), where there were repeated applications for leave to traverse the finding of an inquisition and the opinion of the court remained unchanged that the lunacy was satisfactorily established and still continued, the trial of the question was directed to be at the expense of the lunatic or his friends and not at the charge of his personal estate.

WHO MAY TRAVERSE AN INQUISITION.

Application for leave to traverse a finding of lunacy may be made either by the alleged lunatic himself, by a member of his family, or by any person deriving a title through him, or whose interests have in any way been jeopardized by the acts of the lunatic. (*Matter of Christie*, 5 *Paige*, 242; *Matter of Giles*, 11 *Ib.* 243.)

Any person, having even a contract with the lunatic, may traverse. (*Ex parte Hale*, 7 *Ves.* 261.)

But before granting an application made by an alleged lunatic, or his relatives, the court will first satisfy itself, either by a personal examination of the lunatic, or the report of a referee, that such application is genuine on the part of the lunatic and that he has capacity to understand its nature and object. But a different course will be pursued when the application comes from a stranger, whose rights have been over reached by the inquisition. In such case the court, upon probable cause shown, will award an issue upon the petitioner stipulating to be bound by the final decision therein. But when once such proceedings are instituted, the parties cannot, without the sanction of the court first had and obtained, stipulate to abandon the

trial thereof. And should they do so, the court will set the same aside, and direct the committee of the lunatic to proceed to the trial of the issue. (5 *Paige*, 242; 11 *Ib.* 243; *Ex parte Roberts*, 3 *Atk.* 308; 4 *Bro. Ch. Cas.* 238, *n.*)

Pending the trial of such an issue, the court will, if necessary, make a provisional order for the protection of the lunatic's estate until the question of lunacy is finally decided. (*Matter of Wendell*, 1 *Johns. Ch.* 600; *In re Heli*, 3 *Atk.* 635; *Matter of Russell*, 1 *Barb. Ch.* 42.)

While not wholly opposed to permitting a traverse, yet the court will exercise its discretion in the matter of granting it, according to the circumstances existing at the time, so that, while the party is not debarred, the privilege of protecting his legal rights, the property necessary for his support and that of his family may not be wasted in needless litigation. And before granting a traverse on the petition of the lunatic, as before shown, the court will first satisfy itself by a personal examination of the party, or by a report of such an examination made by a master or referee. (*Matter of Christie*, 5 *Paige*, 242; *Matter of Tracy*, 1 *id.* 580; *Matter of McLean*, 6 *Johns. Ch.* 440; *Matter of Russell*, 1 *Barb. Ch. R.* 38.) This is in affirmance of the common law, where, if a man was found by jury an idiot, he might come before the Chancellor to be inspected, and if found not to be so, the verdict and subsequent proceedings were void. (9 *Rep.* 30; 4 *Coke*, 126.)

Under the shadow of these principles it has accordingly been held that one deriving title through an alleged lunatic, and whose purchase has been overreached by the inquisition, or a *bona fide* creditor, may be allowed to traverse it on stipulating to be bound by the final decision therein. Such persons are not without remedy against inquisitions improperly found (*Matter of Christie*, 5 *Paige*, 242; *Matter of Giles*, 11 *Ib.* 243); and one who has contracted with a *non compos* is such an equitable alienee and owner thereof as will give him a right to traverse the inquisition. But if

the alienee relied on the fact that the contract was executed during a lucid interval it was thought doubtful whether an issue rather than a traverse was not the proper form of action. (*Hall v. Warren*, 9 *Ves.* 605; *Ex parte Ferne*, 5 *Ib.* 832.) So, too, the alienee of a lunatic, or other person having a title to, or interest in his land, may traverse the inquisition as well as the lunatic himself, and if both the lunatic and the alienee traverse and the former is found a lunatic at the time of the alienation, the alienee is bound. (*Shelford*, 152; *In re Roberts*, 3 *Atk.* 312.)

When a traverse to the finding of a verdict of lunacy by a jury is sustained upon a feigned issue, the verdict will be set aside, inasmuch as according to English precedents in Chancery the Crown cannot traverse an inquisition, but a *melius inquirendum* might issue, which in turn the party could traverse. These precedents, however, have no application here, and the verdict of a traverse jury is final. (*Matter of Giles*, 10 *Paige*, 638; *In re Roberts*, 3 *Atk.* 6; *Knight v. Duplessis*, 2 *Ves., Sr.*, 555.)

So, also, where an alleged lunatic in this State is found upon a traverse not to be of unsound mind, the court will make an order superseding the commission, and directing that the property be restored to the alleged lunatic and referring it to a referee to take and state the accounts therein. (*Matter of Clapp*, 20 *How. Pr.* 385; *Matter of Giles*, 11 *Paige*, 638.)

PROCEEDINGS ON TRAVERSE.

When a party desires to traverse a finding of lunacy, he must make application by petition in like manner as for the granting of a commission, giving notice thereof to the opposite party, and must also sustain his application by affidavits of persons affirming their belief in the mental sanity of the alleged lunatic. Copies of all papers in such proceeding must be served upon the committee, or if there be none, then upon the party instituting the proceedings under the commission.

Where the petition is in the name of the alleged lunatic and sworn to by him, the person administering the oath should state in the jurat that he has examined the petitioner with the express intent of ascertaining his state of mind, and has found him to all appearances of sound mind and capable of understanding the contents of the petition. (*Matter of Christie*, 5 *Paige*, 242.) And in England the jurat of an affidavit sworn to by a person suffering from monomania and confined in a lunatic asylum should state the fact that it was sworn in an asylum, otherwise it is irregular and will be taken off the files. (*Spittle v. Walton*, 40 *L. J. Chan.* 368.)

The issue in such a case is always made up under the direction of the court, and may be tried like any other issue of fact before a jury at the Circuit or in the County Court; or before referees, if the parties shall stipulate. The issue is always the same as on the original inquisition, and the question in any such case, as has been well stated in Pennsylvania, is whether the mind be deranged to such an extent as to disqualify the traverser from conducting himself with personal safety to himself and others, and from managing and disposing his own affairs and discharging his relative duties. (*McElroy's case*, 6 *W. & S.* 451; *Ex parte Beaumont*, 1 *Wh.* 52; *Comm. v. Schneider*, 59 *Penn. St.* 328.)

It is usual in such cases to name three referees. And on the trial of the issue it is the duty of the committee acting as the bailiff of the court in whose custody the lunatic is placed, to oppose the traverse and see that the issue is not allowed to go by default. (*Matter of Clapp*, 20 *How. Pr.* 385.) The issue upon a traverse may be tried in England, in a different county from that in which the commission was executed. (*In re Nugent*, 2 *Moll.* 517.)

And there would seem to be no reason why, should the interests of parties demand it, the same rule should not be adopted here. Certainly, if a commission may be executed

anywhere within the State, a traverse may, by parity of convenience, be similarly treated. In such cases it is the interests of the parties alone which will govern the court in deciding where the issue shall be tried, as well as in what form.

TITLE FIFTH.

SUPERSEDEAS.

A commission of lunacy, having for object the protection of the person and estate of a lunatic pending his mental incapacity, ceases to have any legal reason for its continuance whenever the party is restored to his right mind. He may, therefore, petition to have the same superseded, and his estate restored to him. Under the statute *de prerogativa regis*, no supersedeas could issue in the case of an idiot, he being found so *a nativitate* and the infirmity giving the crown the beneficial use of his lands during his life-time. It was only to lunatics and persons of unsound mind, therefore, that a supersedeas would enure as a right of action. And although no law with us draws any similar distinction, yet, practically, as the ancient statute has but followed the law of nature in presuming the fixedness of idiocy, so no court would look with favor upon a petition for a supersedeas in the case of one adjudged to be an idiot.

It is different, however, with those who constitute the ordinary subjects of commissions of lunacy. The law does not contemplate permanent incapacity in such cases, and the Revised Statutes consequently enact that upon the restoration of any lunatic to reason, his estates shall be restored to him. (2 *R. S.*, Part 1, Ch. 20, Tit. 2, § 28; *sixth ed.*, p. 853.) This constitutes a foundation in law for the right to a supersedeas, and the party may file his petition praying that due inquiry may be made of the truth of the matters alleged therein.

In *Ash's case* (*Freeman's Ch. Cas.* 259), the court observed that if a lunatic recovers his senses, he ought to be delivered out of custody, and for that purpose may petition to be inspected, and it is not to be tried by inspection only, but by examining witnesses also, to see whether his being restored to his senses is of any continuation, and likely to hold.

In every case of this kind the petition should be in the name of the lunatic, and allege that he is restored to his senses. (*Ex parte Stanley*, 2 *Ves., Sr.*, 25.)

Experience of the injurious effects of insanity upon the mind everywhere shows that complete restoration to its original vigor is seldom witnessed; that permanent enfeeblement is the most general consequence, and that an increased susceptibility to a return of the disease is grafted upon the mental constitution of the individual for the remainder of life. Under the operation of these natural laws, it becomes difficult, if not impossible, to establish any fixed standard of recovery by which courts can guide themselves in superseding a commission of lunacy. Lord ELDON, in a leading case, remarked with great sagacity, that there was no part of the Chancellor's duty more unpleasant and requiring greater caution than that of determining when a commission should be superseded, for though one might, upon evidence, arrive at a safe conclusion, establishing lunacy, it was very difficult to determine when the mind was restored, that opinion depending upon the circumstances whether the party was led to those topics upon which his mind was affected. "In another case," said his Lordship, "I succeeded in getting Lord THURLOW, after a long conversation with the party, to supersede the commission, and was satisfied from many conferences with him that he was perfectly rational; but immediately after the petition was heard, coming to thank me for my exertions, he in five minutes convinced me that the worst thing that could have been done for him was to get rid of the commission." (*Ex parte Holyland*, 11 *Ves.* 10.)

Chancellor KENT, whose experience in these matters seems to have kept pace with that of the English courts, also observed in this connection that it was difficult to determine when the mind is restored, and the force of testimony must depend upon the circumstances; that the disease was very insidious, and that he had frequently been visited by lunatics against whom an inquisition had been returned and a committee appointed; that their object was always to complain of the proceedings or of the committee, and that he had rarely been able on such occasions to detect the mental infirmity. (*Matter of Hanks*, 3 Johns. Ch. 567.)

Under the light of these opinions, based upon natural laws, it was held in the above-cited cases, that in order to supersede a commission it is not necessary that the mind should be restored to its original state; competence to common purposes, as to make a will of personal estate, is sufficient. But the absence of the disorder, especially if of a dangerous tendency, must be satisfactorily proved by the evidence of persons having competent knowledge of the whole subject, not only as to the present state of the party, but with reference to all the former evidence.

And that upon a petition by a lunatic to supersede the commission and to be restored to his estate, the court will either order it to be referred to a referee to take proof as to the allegations in the bill, and to examine the lunatic, if he thinks fit, and to report the proof and his opinion thereon, or else direct the lunatic himself to attend in court to be examined personally. (*Matter of Hanks*, 3 Johns. Ch. 567.) But if the lunatic be resident within a foreign jurisdiction, although medical certificates be presented to the court showing his recovery, the petition will not be entertained until such time as he may be inspected by the court, or some one acting under its authority. Thus, in the matter of Dyce Sombre, a lunatic and an English subject, resident in Paris, the Lord Chancellor re-

used to entertain a petition for a supersedeas, though based upon certificates of French physicians, until the lunatic should return to England and submit himself to an examination by the court. (1 *Phill. Ch. Cas.* 436.)

But the court has the power to discharge or suspend the proceedings against a *non compos* partially, retaining the control of his property so far only as may be deemed necessary to protect the same for his benefit. It may thus allow the party to make a testamentary disposition of a portion of his estate without at the same time either superseding the commission or surrendering his property into his control. (*Matter of Burr*, 2 *Barb. Ch.* 208.) This has frequently been done in the case of habitual drunkards, who, although improved in their habits, could not yet with safety be intrusted with the independent control of their estates. And in all such applications the court, for the purpose of informing its conscience, will order a reference to ascertain the actual condition of the lunatic's mind, the extent of his property, and the reasonableness of the acts which he prays to be allowed to execute.

Thus, in the *Matter of Gilbert* (*S. C. Chambers*, 1st *Dept.*, Aug., 1876), a lady whose estate, by reason of her mental incompetency to manage it, had been in the care of a committee for many years, petitioned for permission to make a gift of a small portion of the same to a destitute and widowed sister, and it appearing that she fully comprehended the nature of her estate and the consequences upon it arising from such a gift, and inasmuch also as there would still be left an abundance for her support, all which she had previously computed, the court accordingly made an order directing the committee to pay over the sums mentioned in her petition for distribution to her donees.

In England the practice has been, when any doubts exist of the permanent character of the alleged recovery of a lunatic praying for a supersedeas, to suspend the commission instead, for a few months, in order to see whether the

party's recovery is established or not. (*Ex parte Ferrars*, *Mos. Ch. Cas.* 78; 1 *Vern.* 155.)

So, also, a commission implying a present necessity for the protection of the court by which it is issued, cannot be held unexecuted and merely *in terrorem* over the party for an indefinite period. Hence, if not executed within a reasonable time, it may be superseded on the ground of laches, and the party thus neglectful will be made to pay costs, or punished as for a contempt. (*Lunatick Petitions*, 2 *Atk.* 52.) In all cases, therefore, where a party from any cause is placed under a committee, he cannot, though restored to reason, perform any valid act without leave of the court first had and obtained. (*Matter of Patterson*, 4 *How. Pr.* 34.) Thus, in the *Matter of Burr*, as before shown (2 *Barb. Ch.* 208), it was held that the court might suspend the operation of a commission so far as to allow the party who had been found a lunatic to make a testamentary disposition of his effects, without at the same time discharging the proceedings entirely and restoring him to the control of his property. And the ground there taken was that the state of mind of the lunatic had improved, and although not fully restored to his original vigor, yet, were a commission then to be issued against him, he would not probably be found of unsound mind.

But a commission cannot be superseded as to the person and retained as to the estate, for it is not divisible at law. (*Matter of Burr*, 17 *Barb.* 9.) See "*Committee.*" Yet it may be *suspended* as to the person and retained in force as to the estate. In like manner it may be suspended in part as to the estate, so as to authorize the lunatic to make a will, or to receive portions of the income of his estate. (*Will Eq. Jur.* 691; *Matter of Burr*, 2 *Barb. Ch.* 208.)

TITLE SIXTH.

COMMITTEES.

The earliest mention of guardians for the estate of lunatics is to be found in the law of the Twelve Tables. That Code, brief as it now seems to us, was the embodiment of the early Statute Law of Rome, and so deep was the veneration entertained for it, that its provisions as to private rights were never at any time repealed. It ever remained as a sort of constitutional guide to all future legislation. In the fifth Table (fragm. 4) is to be found this passage. "*Si Furiosus est agnatorum gentiliumque in eo pecuniaque ejus potestas esto.*" But the *furiosus* was not interdicted as was the *prodigus*, and what he did might be valid if done in a lucid interval.

The Institutes also contained a provision to the following effect, viz.: "*Sed et mente captis et surdis et mutis et qui perpetuo morbo laborant quia rebus suis superesse non possunt, curatores dandi sunt.*" (*Lib. 1, Tit. 23, § 4.*) This was an additional enactment for the protection of a class of weak-minded persons not mentioned in the Twelve Tables. In all the foregoing cases, whether of lunacy or imbecility, a *curator* of the estate was appointed. Keeping in view, however, the constant possibility of a lucid interval, the question was often mooted by Roman lawyers as to whether it operated to supersede the curatorship *pro hac vice*. But Justinian decided this in the negative, holding that while the curatorship could not thus expire and be revived, with the alternating conditions of the lunatic's mind, acts performed by him in a lucid interval might still be valid. (*Ortolan, Instit. Vol. 2, p. 197; Code 5, 70, 6.*)

The *curator* was, therefore, exclusively a committee of the estate, while the tutor had a wider authority which included both the person and the estate. A tutor was always given to infants and to women, *propter animi levitatem*,

both whose civil status was deemed a fixed one at least during legal nonage.* On the other hand when any intervening and temporary conditions caused any *capitis deminutio* in the individual, he was placed under a curator. The same magistrates appointed both kinds of guardians. (*Ortolan, Instit. Vol. 2, pp. 136, 197.*)

The *capitis deminutio* in the case of lunacy was of the sort known as *deminutio media*. In this condition a curator of the estate was appointed, but not necessarily a tutor of the person, because the law always contemplated the possibility of a lucid interval, during which the lunatic might perform legal acts, while if placed under a tutor he became as an infant totally disfranchised and was not *sui juris*. (*Instit., Lib. 1, Tit. 23, De Curationibus, § 3.*)

The object of an inquisition being to ascertain whether the alleged lunatic is, or not, capable of managing his affairs, it follows that after a finding of lunacy against the party, it becomes the duty of the court to appoint a committee of his person and estate. For, the necessity of placing a party under guardianship pre-supposes the existence of a state of mind dangerous either to the safety of the lunatic's person, or that of his estate. Hence, to authorize the appointment of a committee, the party's unsoundness of mind and consequent legal incapacity must first be fully established. (*Matter of Shaul, 40 How. Pr. 204.*) On moving, therefore, for an order to confirm the return of the commission, an application may be made for the appointment of such committee; and any one who has opposed the commission may oppose the appointment of the committee.

It is usual to appoint but one individual as committee, both of the person and the estate of a lunatic. Nevertheless if the estate be so large as to require special experience

*Tutores constituuntur tam masculis quam feminis, sed masculis quidem impuberibus duntaxat, feminis autem tam impuberibus quam puberibus. (*Ulp. Reg. 11, § 1.*)

to administer it; or if it casts onerous duties upon the committee, two persons may be appointed to serve, one in each capacity. Apart, however, from the extent of the estate, there may be circumstances in the life of the lunatic where the most suitable party for a committee of his person would not at the same time be competent to act as committee of the estate. In such cases looking always first to the personal safety and comfort of the lunatic, and afterward to the protection of his property, the court will select the party best qualified under all the circumstances for committee of the person, and then proceed to act similarly toward the estate. (*Matter of Livingston*, 1 *Johns. Ch.* 436; *Ex parte Ludlow*, 2 *P. Wms.* 635.) A committee of the person may also be appointed without a committee of the estate, instead of which the property may be put in the hands of a receiver. (*Will. Eq. Jur.* 691; *Ex parte Warren*, 10 *Ves.* 622; *Matter of Russell*, 1 *Barb. Ch.* 43.)

But a person adjudged incapable of managing his own estate is in law presumed to be incapable of managing himself. Therefore, when a court has authority given it over the person and the estate, the jurisdiction cannot be divided, and both must stand or fall together. (*Ex parte Loveday*, 8 *Eng. L. & E.* 235.) A committee of the estate alone may be appointed in this State, for a non resident lunatic. And for a lunatic resident here a committee of the person may be appointed, although he has property in another State and a committee of his person and estate have already been appointed there. (*Matter of Taylor*, 9 *Paige*, 619; *In re Tottenham*, 2 *My. & Cr.* 39; *In re Keene*, *Ib.* 42.) So also during the necessary absence of the committee a temporary one may be appointed. But if a lunatic be a resident of this State the appointment of a committee of his estate alone would be anomalous in practice, and will not consequently be granted. (*Matter of Burr*, 17 *Barb.* 13.)

In selecting a committee the court will generally be guided by the wishes of the lunatic or his next of kin, and will even give a preference to them, provided no serious objections exist for so doing.* Thus the son of a lunatic father, if a proper person, will be appointed committee. (*Lord Bangor's Case*, 2 *Moll.* 518.) Under like circumstances, husbands will be appointed committee of their wives, and wives of their husbands, and the custody of a lunatic may be granted to a *feme covert* though she be not *sui juris*, but under power of her husband. (*Ex parte Kingsmill*, 3 *P. Wms.* 111, *n.*) But in such cases it has been usual in England to join some one with her. (*Ex parte Hugh*, 18 *Ves.* 22; *Lord Wenman's Case*, 1 *P. Wms.* 701.) No general rules on this subject have been laid down by our courts. It has also been said that in the case of an unmarried female lunatic, her custody will generally be given to one of her own sex. But there is certainly no valid reason at present existing for such a rule, if by custody be meant the right of the committee to confine and care for a lunatic ward. The only decision upon which this assumed rule of practice rests was that rendered in *Ex parte Ludlow* (2 *P. Wms.* 638; *A. D.* 1731). That judgment was simply based upon the personal aspects of the case, and it was pronounced in a day when asylums were not common in which to confine lunatics. At that time the committee of the person was expected to be the personal custodian of the lunatic and to keep him either in his own house or that of the committee. That day having passed, the reason for such a rule has passed with it. So also many of the decisions limiting the rights of married women to act as sole committees of lunatics, although of binding authority in England, have no similar authority here.

As will thus be seen, courts, by reason of the particular

* The law of the Twelve Tables gave the guardianship in such cases to the *agnati*, a rule to which Horace alludes in the third satire of his second book.

Interdicto huic omne adimat jus Prætor, et ad sanos abeat tutela propinquos.

delicacy of the trust, always lean toward the selection of the next of kin as committee. And where such persons being of full age unite in the petition praying for the appointment of a committee and naming a suitable person, it is usual to appoint him by an order duly entered for that purpose, without the expense of a reference to inquire into his qualifications. In accordance with these rules it has been held that the appointment of a stranger to be the committee of the person and estate of a lunatic, without the request of his relatives and next of kin or their assent, without an order of reference, and without notice to the persons having a prospective interest in his estate, is not authorized by the practice of our courts. (*Matter of Lamoree*, 32 Barb. 122.) The court may, however, in the exercise of its discretion, appoint a committee in such case without any previous reference, for if its conscience can be otherwise enlightened, it will be sufficient. (*Matter of Mason*, 1 Barb. S. C. 441.)

Should a reference be ordered, the heirs or next of kin have the right upon the hearing to offer themselves as such committee. Due notice should be served upon them of the proceedings, although even without this they may appear and make their request. (*Matter of Lamoree*, 19 How. 375; *Matter of Persse*, 1 Moll. 439.)

This rule that a stranger cannot be appointed committee without the consent of the next of kin, except after a reference of which they are entitled to notice, has been found incapable of universal application. And it was accordingly qualified in the *Matter of Ann Eliza Owens* (47 How. Pr. 150), to the extent of making its application depend upon the particular circumstances of the case. There a female idiot living with her mother was, after office found, placed under a committee without the knowledge or assent of her next of kin, her sister. The mother had declined to act as such, the sister was in feeble health and the court accordingly appointed its clerk as committee. On an appeal

from an order at special term denying an application made by that sister to vacate the order appointing the committee, it was held not to be irregular to appoint a stranger the committee of the person and estate of an idiot or lunatic, without notifying those who, as next of kin, will succeed the idiot or lunatic as heir.

It would indeed seem most natural that the custody of such persons and their estates should be committed to the next of kin, or even to an heir at law, though in contravention of the old rule. And Chancellor KENT, in the *Matter of Livingston* (1 Johns. Ch. 436), said that there was no sufficient reason for the common-law rule which disqualified the heir at law for serving as committee. He accordingly appointed the daughter of a lunatic mother her committee upon the requisite security being furnished.

The appointment of the next of kin as committee is not, however, a matter of course. And it will not be done if there be any circumstances making it less advantageous to the interests of the lunatic. Unless relatives can show a better reason for their own appointment than for that of a stranger they will not be selected. (*Matter of Taylor*, 9 Paige, 611.)

Proximity of residence of the committee to that of the lunatic, so that he can frequently visit his ward and oversee his condition is another consideration of great weight with courts in the appointment of a committee. But with the present facilities of intercommunication it is not necessary that the committee should reside in the county in which the inquisition was held, nor, in view of the possible necessity of the lunatic being sent to an asylum, in the same county where that asylum is located. Such exactions would be unreasonable toward the committee without being in the least degree beneficial to the lunatic. And it is sufficient if the committee be a resident of the State, within the jurisdiction of its courts and subject to their orders and judgments. For in this, as in all other trusts of a similar kind,

no more limited residence of the trustee is required. (*Matter of Lamoree*, 32 Barb. 122.)

If the referee be satisfied with the qualifications of the committee proposed and of his sureties, and the amount and form of the bond given, he so reports it to the court. And if this report be approved, an order is thereupon entered confirming the same, and for the appointment of the committee, upon his complying with the conditions mentioned in such order, according to the rules of the court.

As conflicts of interest between the next of kin of a lunatic, or strangers, often arise upon the question of the selection of a proper committee, the affidavits presented in relation thereto are sometimes made the instruments for assailing personal character under cover of legal testimony. In England it has been decided that scandal, if introduced into affidavits, may be expunged by the court, and the allegation of a fact, although such fact be material, may be scandalous, depending upon the question whether it is introduced not by insinuation, but in such a form that it may be met by contradiction and punished as a libel. (*Ex parte La Heup*, 18 Ves. 221.) And in like manner parties publishing a pamphlet reflecting upon the conduct of parties managing a lunatic's affairs, or addressing letters to the court pending proceeding, may be punished for contempt. (*Ex parte Jones*, 13 Ves. 237.) The same rule which applies to scandalous matter in England would unquestionably apply here under general principles of equity pleading. (*Story's Eq. Plead.*, §§ 266, 862.)

BOND OF COMMITTEE.

No committee, whether he be the next of kin of a lunatic or a stranger, can enter upon the discharge of his trust until he has first executed a bond with two sufficient sureties to be approved by the court appointing him, conditioned for the faithful performance of his trust; that he will render a faithful account whenever required in accordance with the

rules of the court, and will obey all orders and directions of the court relating to his duties. (2 *Barb. Ch. Pr.* 237.) The court may, in its discretion, relieve the committee from the obligation of furnishing security, as where, for instance, no person can be found who will incur such responsibility, although reasons founded upon consanguinity alone will not suffice. (*In re Frank*, 2 *Russ. Ch.* 450; *Matter of Burrough*, 1 *Con. & Law*, 309.)

The penalty in the bond, which it devolves upon the court appointing the committee to fix, is governed by the extent of the real and personal estate of the lunatic. In view of the fact that, under the statute, no disposition of the real estate can be made by the committee except upon filing a special and additional bond to that first given upon his appointment, there would seem to be no equitable reason why, so far as the body of the real estate is concerned, any bond should at the outset be given at all, except for the amount covered by the income or rents and profits of that real estate, since this is all in fact over which the committee has any discretionary power. Therefore, as the personal estate is more immediately under the control of the committee than the realty, it will suffice at the outset if the penalty be in double the value of the personal estate. This bond should be made payable either to the people of the State or the clerk of the court. (*Matter of White*, 1 *Barb. Ch.* 43.)

After it has been duly executed by the committee and his sureties been acknowledged before a proper officer, and the sureties having in turn justified, the court has certified its approval of the instrument by a proper indorsement thereon, it should be filed with the clerk of the court. (*Sup. Court Rules*, No. 6.) These formalities having been completed, the committee may then and not before legally enter upon the discharge of his duties. (1 *Moulton's Ch. Pr.* 113.)

AUTHORITY OF COMMITTEE.

A commission issued in another State gives no authority to a committee appointed under it to exercise any control over the real estate of a lunatic situated in New York; but a new commission must be awarded and a new committee appointed for that purpose. (*Ex parte Jenkins*, 2 Johns. Ch. 124; *Ex parte Pettit*, 2 Paige, 174; *Matter of Perkins*, 2 Johns. Ch. 124; *Matter of Duchess of Chandos*, 1 Sch. & Lef. 301; *Ex parte Gillam*, 2 Ves. 587.)

Nor even can such a committee, being the creature of a foreign jurisdiction, be recognized by our laws, since he is not within the reach of the process of our courts, and the performance of his duties, and his obligations to account for the manner in which he has administered his trust can not be enforced as contemplated by statute. (2 R. S. 850, 6th ed., §§ 3, 4, 5; 852, § 20.) In the absence of statutory authority other States will not recognize the artificial character personified in a committee. (*Matter of Neally*, 26 How. Pr. 402; *Story's Conf. of Laws*, 424; 3 *Burge on Colonial Law*, 1007.)

Hence, a committee appointed in one State is not a legal guardian *quoad hoc* in any other. (*Ex parte Rosenberg*, 1 Leg. Gaz. R. 49.)

It is doubtless true that proceedings judicially affirming a finding of lunacy against a party, and had according to the laws of any State in the Union, are under the Constitution of the United States and the laws made in pursuance thereof, when properly attested, entitled to the same faith and credit in other courts as in those of the State whence they emanated. (*Const.*, Art. 4, § 1; *U. S. Stat. at Large*, Vol. 1, p. 122.) But while the record of such lunacy would be presumptive evidence in this State, and afford a reasonable ground upon which to award a commission, proceedings in the nature of an inquisition would still be necessary before the court would be authorized to

appoint a committee. And although, under the rules of the English Chancery, it was the usual course for the Chancellor in the colony to grant the custody of the lunatic's real estate to the committee appointed by the Lord Chancellor of England, such a rule cannot well obtain here under the varying statutory provisions of sovereign and independent States. (3 *Burge's Col. Law*, 1008.)

Although, under the Revised Statutes (2 R. S., p. 853, § 29, 6th ed.), the power of any committee of a lunatic ceases upon the death of the latter, that event does not of itself determine his responsibility. He is still under the control of the court like any other person in the position of a bailiff, trustee or receiver, who is to act merely officially, and is not permitted, therefore, to interfere in any manner with the rights of third persons, on the determination of his authority as committee. Hence he continues liable to account, and to all the consequences of any misconduct on his part, and is bound to act in delivering possession of the estates as the court shall direct. (*In re Fitzgerald*, 2 Sch. & Lef. 440; *Ex parte Clerk*, *In re Duchess of Norfolk*, Jac. Rep. 589.) But where such committee has an interest in the estate of the lunatic either as creditor or legatee, he should petition for permission to proceed at law or in equity to assert his claim, and meanwhile may retain possession of the estate, still acting in his capacity of committee. (*Ibid.*, *In re Hahn*, Shelf. 288.)

DUTIES OF COMMITTEE.

The committee being the bailiff of the court in its relations to the person of the lunatic, and the trustee of an express trust in his relations to the lunatic's estate, is under obligations to make all necessary efforts, according to the means in his power, to secure the comfort, happiness and recovery of his ward, as well as to protect his estate against waste. For these reasons it is his duty to discharge his trust in such way as to carry out the purposes intended by

the court in appointing him, and to follow the course of judicial determinations relating to the powers and duties of his office. Besides the provisions of the statutes regulating his powers, he must in all cases of doubt apply by petition for leave to undertake any thing not specifically mentioned in them, although it may seem to fall by implication within the limits of those powers.

In cases of lunacy, the first care of the court is the maintenance of the lunatic, and after that it is a rule never departed from not to vary or change the property of the lunatic so as to affect an alteration in the succession. (*Lord Annandale's Case*, *Amb.* 80; *Weld v. Tew*, *Beatty's Ch.* 266.) For these reasons, under our statute no disposition of the real estate of a lunatic can be made by his committee, without permission first had and obtained from a court of competent jurisdiction, and upon giving additional bonds conditioned for the faithful performance of the trust. (2 *R. S.*, 6th ed., p. 850, § 7, and p. 852, § 20.)

In order to secure the entire comfort of the lunatic, the costs of his maintenance are not to be limited to the amount of his income. *In re Persse* (3 *Moll.* 94) the Lord Chancellor observed that the maintenance of a lunatic was not to be limited, like that of an infant, within the bounds of his income. It was not to be limited except by the fullest comfort of the lunatic. Fanciful enjoyments, and even harmless caprices were to be indulged up to the limits of the income, and for solid enjoyments and substantial comfort the court would, if necessary, go beyond the limits of the income. (See, also, *Ex parte Chumley*, 1 *Ves.* 296; *Ex parte Baker*, 6 *Ib.* 8; *Oxenden v. Compton*, 2 *Ib.* 72.)

In the *Matter of Saulsbury* (3 *Johns. Ch.* 347) Chancellor KENT held that the governing principle in the management of a lunatic's estate was the interest of the ward, and not that of those who might have eventual rights of

succession. And for the promotion of this end, real property might be converted into personal, and personal into real, without regard to the contingent interests of the real or personal representatives. So, too, personal property may, in the discretion of the court, be applied by the committee to the improvement of the unproductive real property of the lunatic. (*Matter of Livingston*, 9 Paige, 440.) And in the protection of the interests of such a party, and where the care of his estate requires the employment of an agent or clerk, the court, upon the application of the committee, will allow him to employ such an agent, and to pay to him a reasonable compensation out of the income of the lunatic's estate. But the committee himself cannot act as such clerk, nor receive any compensation beyond his allowance for commissions as committee. (*Ibid.*)

The settled principle both in England and in this State is that the expenditures which may be made for the maintenance of a lunatic are to be governed solely by the extent of his means. Thus in a late case (*Matter of Colah*, 3 Daly, 529, 11 Abb. Pr. N. S. 209), where a Parsee merchant, coming to New York to embark in business, became insane, it was held to be within the authority of the court to send him back to India under the charge of his committee, and at the expense of his estate, because no probable expense should deter the court from directing to be done whatever appeared to be most advantageous for the lunatic, without regard to the next of kin.

Where the lunatic, though residing in another State, owns property in this, the property in the hands of the committee appointed at his place of residence is the primary fund for his support, and it should be first applied to his support by the committee having control of his person. (*Matter of Taylor*, 9 Paige, 611.)

CONTROL OF THE PERSON OF THE LUNATIC.

As to the person of the lunatic, the committee has the entire control, and may place him in, or remove him from,

any asylum, according as he deems it best for the interests of the party, or the protection of his estate against needless and wasteful expenditure. But should he remove him without the jurisdiction of the court, he may be compelled to bring him back again, for the court has unquestionably the authority at the outset to forbid such removal without leave first had or obtained, or on recalling the lunatic into its jurisdiction to prevent his being again transported beyond it. (2 *Hoff. Ch. Pr.* 262; *Matter of Wing*, 2 *Hun*, 671.) It is made the duty of the committee by statute (*Chap.* 446, *Laws of 1874*, *Tit.* 1, § 6), where the lunatic is either dangerous to himself or to others, and has sufficient property to maintain himself, to provide a suitable place for his confinement. What constitutes a suitable place is a question not to be exclusively decided by the legal character of the commitment. But like questions of necessities and paraphernalia is to be governed by the personal circumstances of the lunatic. These should always govern.

But where all the estate of a lunatic has been consumed in his necessary maintenance, the court will on petition of the committee and upon the report of a referee order the lunatic to be delivered to the overseer of the poor. (*Matter of McFarlan*, 2 *Johns. Ch.* 440.)

In the case of an habitual drunkard the committee, subject always to the direction of the court, has the right to decide upon the proper residence of the party, and the court will aid in enforcing such decision where necessary. And should any person harbor or retain such drunkard in their custody against the wishes of the committee it is the duty of the committee to apply to the court for an order compelling the custodian of the drunkard to surrender him into the hands of the committee, or to refrain from harboring him. (*Matter of Lynch*, 5 *Paige*, 120.)

And where vendors of intoxicating drinks supply the drunkard against the wishes of his committee, it is the duty of this latter to bring the matter to the notice of the court,

upon showing which an order will be made, prohibiting such supplies to the drunkard under the penalties of a criminal contempt. (*Matter of Heller*, 3 *Paige*, 200; *Matter of Hoag*, 7 *Ib.* 302.) As the reformation of the drunkard is the one point always kept in view, the court will, if necessary, direct his confinement in a lunatic asylum, and may also order his real estate to be sold for the purpose of supporting him there. (*Ibid.*)

It will thus be seen that the reformation of the drunkard, like the recovery of the lunatic, is the chief end always to be kept in view by the committee, and in order to secure this he may employ all necessary means, whether in the control of the person of his ward, the selection of his place of residence, or through the prohibition imposed upon third parties of selling or supplying him with any spirituous liquors.

INVENTORY AND ACCOUNTS.

It is made the duty of the committee by statute to file an inventory, under oath, of the whole real and personal estate of his ward. (*Chap.* 446, *Laws of 1874*, *Tit.* 2, § 3.) Consequently, if he neglects to do so, or to render his accounts regularly as required, every presumption will be taken most strongly against him in the settlement of his accounts. And the court may, under the above statute, (§ 4) compel the filing of the inventory by the order and process usual in such cases. And where he has been guilty of gross negligence, he will be decreed to pay the costs of the proceedings against him to obtain his removal and the settlement of his accounts. (*Matter of Carter*, 3 *Paige*, 146; *Matter of Seaman*, 2 *Ib.* 409.)

DUTY ON TRAVERSE.

The committee must also defend the position in which he is placed against any legal proceedings instituted to

annul the commission. Hence, where by an order of the court an inquisition of lunacy found by a jury is to be traversed by the lunatic by an issue to be framed and made up for trial, which may be done before one or more referees, it is the plain duty of the committee appointed under such inquisition to oppose the traverse and see that the issue is properly tried, and not suffered to go by default. And the committee will be entitled to the legal expenses incurred in the proceedings on the inquisition, and in opposing the traverse of it before the referees, including the bills of the attorneys of the committee and a reasonable counsel fee upon the trial of the traverse, and all disbursements, to be paid out of the funds of the estate in their hands. (*Matter of Clapp*, 20 *How. Pr.* 385.)

REMOVAL OR DISCHARGE OF COMMITTEE.

The committee is liable to be removed summarily for any misconduct, upon an application to the court for that purpose, supported by proper affidavits, or, if the court shall deem best, an inquiry may be had before a referee. If he has himself been the offending cause of his removal, he will be charged with the costs of the proceedings looking thereto. (*Matter of Carter*, 3 *Paige*, 146; *Shelford*, 182; *Black's case*, 18 *Penn. St.* 434.) And an order removing a committee and appointing another is always in the discretion of the court and not appealable to the general term. (*Matter of Griffin*, 5 *Abb. Pr. N. S.* 96.)

He may also be discharged at his own request upon proper application. But he will not be without showing some valid reason for resigning his trust, and the fact that the situation is rendered unpleasant in consequence of existing controversies between different members of the lunatic's family is not sufficient for that purpose. (*Matter of Lytle*, 3 *Paige*, 251.) So, too, if upon such removal it be necessary to take and state an account between such committee and the estate of the lunatic before a referee designated by

the court, it will be improper for the parties to substitute another person as referee without the permission of the court. (*Ibid.*)

COMPENSATION OF THE COMMITTEE.

The standard by which the compensation of committees is regulated, is that fixed by the Revised Statutes for executors and administrators, viz.:

For receiving and paying out all sums of money, not exceeding one thousand dollars, at the rate of five dollars per cent.

For receiving and paying out any sums of money exceeding one thousand dollars and not amounting to ten thousand dollars, at the rate of two dollars and fifty cents per cent; and

For all sums above ten thousand dollars, at the rate of one dollar per cent.

In addition to this fixed compensation they are entitled to such an allowance for their actual and necessary expenses as shall appear just and reasonable. (3 R. S. 532, § 71, 6th ed.)

Where the committee consists of more than one person the compensation will be apportioned among them according to the provisions of the statute.

Although it has been held that these commissions are intended to be a full compensation for the personal services of the committee beyond which he can make no legal charge, yet the court may, in its discretion, make any additional allowance which the circumstances of the case may seem to warrant. Thus in the case of the Parsee merchant, before referred to (*Matter of Colah*, 3 Daly, 529), where the committee of the person of the lunatic was directed to take his charge to India, the court observed that this was an exception to the general rule that no compensation should be allowed to the committee of a lunatic for his personal services, and that he should be properly remunerated for that

service. And a similar doctrine was laid down in England, *In re Sotomajor* (9 *L. R. Ch.* 677), and *in re Garnier* (13 *L. R. Eq.* 532; 41 *L. J. Ch.* 419), so that it may now be considered a settled rule that where a committee renders any exceptional services to his ward, such as traveling with him to distant parts, or giving up to him any extraordinary measure of his time and personal attention, he will be entitled to apply for extra compensation in the form of an allowance.

TITLE SEVENTH. *

OF SUITS RELATING TO LUNATICS.

1st. *On their behalf.*

Suits undertaken on behalf of idiots, lunatics, persons of unsound mind or habitual drunkards, after office found, must be brought, except as otherwise permitted by statute, by bill in equity. Being persons under civil disability they can neither sue nor be sued except through the committee of their estate, he being alone responsible for the conduct of the suit. (2 *Barb. Ch. Pr.* 224.) And if the complainant in a bill appears to be a lunatic, and no next friend or committee is named, the defendant may demur. (*Mitford's Ch. Pl.* 229.)

Therefore, if a bill be brought against a lunatic, stating him to be such, it is a matter of course to assign him a guardian *ad litem* to appear and defend for him, if he has

*LIMITATION OF ACTIONS.

By section 375 of the New Code of Civil Procedure, the time during which a party, who is insane, may commence an action to recover real property or the possession thereof, or to make an entry or interpose a defense or counter-claim founded on the title to real property or to rents or services out of the same is not a part of the time limited in that title (20 years. See §§ 365, 366), except that the time so limited cannot be extended more than ten years after the disability ceases.

no committee; and if the bill do not state the defendant to be a lunatic, the fact may be shown by affidavits or otherwise. (*Wollaston v. Dixie*, 1 *Fowler's Ex. Pr.* 477.) In case the mental incompetency is disputed, the court will refer it to a master to inquire and report. (*Lee v. Rider*, 6 *Madd.* 294.)

It has always been the practice in England that idiots and lunatics should sue and defend by the committee of their estate, who are by order of the court appointed guardians for that purpose. Should it happen that an idiot or lunatic, not having been judicially declared so, has no committee, or the committee has an interest in the suit adverse to that of the lunatic, an order may be obtained for appointing another person as guardian for the purpose of conducting or defending the suit, or he may sue by his next friend. (*Tyler's Mitford's Ch. Pl.* 200; *Westcomb v. Westcomb*, *Dick.* 233; *Howlett v. Wilbraham*, 5 *Madd.* 423; *Such v. Hyat*, *Dick.* 287; *Ib.* 480.) And it has been held that the wife of a lunatic who has no committee, has a sufficient implied authority to sue in his name for debts due him. (*Rock v. Slade*, 7 *Dow. P. C.* 22.)

Formerly a similar rule obtained here in regard to bringing suits in the name of the lunatic by his committee or next friend. In *Gorham v. Gorham* (3 *Barb. Ch.* 24), the court went into a very full examination of this doctrine and favored the English rule that the name of the lunatic must be joined to that of his committee, although Chancellor KENT, in *Ortley v. Messere* (7 *Johns. Ch.* 139), held that it was not necessary for the lunatic to be a party plaintiff with his committee to set aside an act done by the lunatic while under mental incapacity. He thought it mere matter of form, and that it was immaterial whether the lunatic was joined with his committee or not. The general practice favored it and that was all.

But whatever may have been the rule in England, or the former practice here, the statutes of 1845, chap. 112; of

1864, chap. 417, and of 1874, chap. 446, together with the old Code of Procedure, § 113, and the new Code, § 449, have entirely swept away all ground of doubt upon this subject. Previous to the passage of these statutes, an action for money had and received to the use of a lunatic could not be maintained in the name of his committee. (*Lane v. Schemerhorn*, 1 *Hill*, 97.) Nor an action of ejectment on the title of the lunatic, there being then no difference between actions relating to the real, and those relating to the personal estate of the lunatic. (*Petrie v. Shoemaker*, 24 *Wend.* 85.) By the operation of the statute the committee is now to be regarded as the trustee of an express trust, and under the Code trustees of an express trust may sue without joining the person beneficially interested. (*Person v. Warren*, 14 *Barb.* 488; *Davis v. Carpenter*, 12 *How. Pr.* 287.) This doctrine is in full analogy with that applicable to general guardians of infants, to whom in many respects, lunatics are in law assimilated. (*Thomas v. Bennett*, 56 *Barb.* 197.) In conformity to these principles, it has been held that a committee might release mortgaged premises. (*Pickersgill v. Read*, 5 *Hun.* 170.) And in like manner it has been held that a suit in equity to rescind the sale of a farm made to a lunatic, and to cancel the satisfaction of a mortgage given by him is properly brought in the name of the committee of such lunatic. (*Fields v. Fowler*, 2 *Hun.* 400, affirming *Person v. Warren*, 14 *Barb.* 488, and making a distinction from *McKillip v. McKillip*, 8 *Barb.* 552, which was decided before the Code. See, also, *Warden v. Eichbaum*, 14 *Penn. St.* 121; *Klohs v. Reifsnyder*, 61 *Ib.* 240.)

In every action brought by a committee he must set forth facts showing his appointment, and the authority under which he sues. (2 *Barb. Ch. Pr.* 224.) Unless he does so, he does not state a cause of action and his complaint is bad on demurrer, on that ground. (*Sheldon v. Hoy*, 11 *How. Pr.* 11; *White v. Low*, 7 *Barb.* 204; *Bangs v. McIntosh*,

23 *Barb.* 591.) The general principle governing actions brought by guardians, receivers, executors, administrators, are fully applicable to the case of committees. They are equally persons suing *en autre droit*.

The committee being the mere bailiff of the court *quoad* the lunatic, and the trustee of an express trust as to his estate, is empowered as has been heretofore shown to bring suit in his own name, but in law the action is really that of the lunatic. Hence, if pending such action the lunatic dies, then, although the functions of the committee expire and the action as to him abates, it may be revived and continued in the name of his executor or administrator. It is only necessary to show that the party has succeeded to the title of the deceased plaintiff, when the court must, upon motion, allow the action to be continued. (*Code of Civil Proced.* § 757; 2 *Barb. Ch. Pr.* 680; *Potter v. Van Kraken*, 36 *N. Y.* 619; *Livermore v. Bainbridge*, 49 *Id.* 125.) Thus in *Smith, Committee of Gales, a lunatic, v. Hatch* (*N. Y. Common Pleas, Special Term, Nov. 5, 1877*), a motion was made by the committee to revive and continue an action by, and in the name of the executrix of said Gales, who had died since the action was at issue. The action was brought to rescind a sale of real estate and to procure the deed thereof to the lunatic to be declared void; also, that a mortgage he had executed for part of the consideration money should be adjudged void, and that it be delivered up and canceled, and that plaintiff recover so much of the purchase-money as the lunatic had actually paid on such purchase. It was opposed upon the claim that the action thus brought by the committee, in his own name, did not abate by the death of the lunatic, so that the cause of action could be enforced by the executrix.

The court, upon a full review of all the authorities, remarked that "the present action was well brought by the committee as nominal plaintiff as trustee of an express trust, holding his powers, however, as mere bailiff of the court,

without the lunatic being divested of any rights to his property or rights of action. From these considerations it appears the action, though brought in the name of the committee, was actually in law the action of the lunatic; and on his death, the functions of the committee having ceased, the right so sought to be enforced survived to the personal representative of the lunatic, who is in law authorized to continue the action. An order to that effect should, therefore, be granted."

But in all cases where an executor applies to revive a suit he must show that he has taken probate of the will of the deceased. (*Douglass v. Sherman*, 2 *Paige*, 358; 1 *P. Wms.* 753.)

Full power and authority being thus given by statute to committees to sue in their own names, all former rules as to joining the lunatic's name in an action are consequently removed, except in cases where any idiot, lunatic or other person of unsound mind holds any real estate in joint tenancy, or in common, or in any other manner, and the interest of such *non compos* requires a partition thereof. There the lunatic or other person of unsound mind is a necessary party to the suit, but application must be made by the committee to authorize his being made a party also (3 *R. S.*, § 105, 6th ed.; 1 *R. L.* 148, § 4; *Gorham v. Gorham*, 3 *Barb. Ch.* 24.)

In the case of an habitual drunkard whose malady is so largely self-limited, and who may be restored to the possession and control of his estate, pending the issue of a suit against his committee by a creditor seeking to enforce a claim against the drunkard's estate, in such case it is proper to make the drunkard a party to the action in order that the judgment when recovered may be binding upon him. (*Beach v. Bradley & Lay*, 8 *Paige*, 146; *New v. New & Snyder*, 6 *Ib.* 237.)

Before the passage of the various acts above cited the committee was considered only as a bailiff of the court, the

interest and the right of action still remaining in the lunatic, and the action had to be brought in the name of the latter.* Now the committee acts as an independent trustee.

If, after a suit is begun, the complainant becomes insane, the suit may still continue upon a supplemental bill being filed by the committee. So, also, if the committee dies *pendente lite* the suit may, after appointment of a new committee, continue. (*Dan. Ch. Pr.* 90.) Objections to a bill on the ground of lunacy extend to the whole bill and apply as well to bills for discovery as well as to bills for relief. And the reason given is that the defendant in a bill for discovery only, being always entitled to costs after a full answer, would be materially injured by being compelled to answer a bill exhibited by persons whose property is not in their own disposal, and who are, therefore, incapable of paying costs. (*Wartnaby v. Wartnaby*, 1 *Jac.* 377.)

In *Demilt v. Leonard*, 11 *Abb. Pr.* 252, it was held that an action may be maintained on behalf of a lunatic to set aside a judgment which is overreached by an inquisition of lunacy, or the court may on motion set aside such judgment. In that case subsequent to the recovery of judgment against plaintiff, which was recovered for costs on proving a former settlement of the matters in controversy, an inquisition in lunacy was had concerning the plaintiff, and she was declared thereby to have been incapable of managing her affairs for a period which included the time of the alleged settlement.

In seeking to set aside judgments recovered against lunatics in actions at law, whenever such judgments are overreached by inquisitions of lunacy, the proper course is by summary application to the court in which the judgments were obtained, or by writ of error. Or if there be no remedy at law and the judgments have

* The reason why a lunatic but not an idiot was required to be a party to a suit instituted in his behalf was, that a lunatic might recover his mind, while an idiot would not. (*Att'y-Gen. v. Woolrich*, 1 *Ch. Cas.* 153; 1 *Dan.* 115.)

been improperly recovered against a lunatic for pretended claims which were not justly due, it will be a proper case for the committee to proceed by bill in equity to be relieved of such judgments. (*Matter of Hopper*, 5 Paige, 491.) But where there is no irregularity in the proceedings, the remedy must be sought solely in a court of equity, since it is only there that the fairness of a judgment obtained against a lunatic may be inquired into by an equitable action instituted by his committee. (*Clark v. Dunham*, 4 Den. 262; *Robertson v. Lain*, 19 Wend. 649.)

In the absence of any statutes giving to committees authority to sue in their own names, as are now in force in New York, the course of procedure will necessarily be different. Thus where a bill is filed by the committee of a lunatic to set aside an act done by such lunatic on the ground of incompetency, it is not necessary that the lunatic himself should be made a party, but he *may be* joined as a party with his committee. And where a lunatic is not made a party to a bill or information in his behalf, it is a good ground for demurrer.

The suit should be brought in the name of the lunatic, stating that he sues by the committee of his estate, or be prosecuted in the names of the lunatic and his committee.

Bills filed by committees in their own names, in which they only describe themselves as committee, are bills by the committee alone, and not a bill of the lunatic by his committee, and a decree in favor of the complainant would not be a decree in favor of the lunatic.

A lunatic is a necessary party to a bill filed by his committee for the partition of real estate. A decree in partition upon a bill filed by the committee alone and to which the lunatic is not a party, will not transfer the legal title to his undivided share of that portion of the premises which is set off to the defendant in severalty. In New York, by making the lunatic a party to a partition suit, his legal title to that portion of the premises which may be set off to the

adverse party, in severalty, passes without any conveyance either from the lunatic or his committee under the Revised Statutes relating to the partition of lands. (*Gorham v. Gorham*, 3 Barb. Ch. 24.)

STATUTE OF LIMITATIONS AS AFFECTED BY LUNACY.

The effect of the statute of limitations, as a bar to actions, can of course apply only to those cases where the plaintiff was at all times competent to sue, but neglected to do so. His laches are the bar created by him to the enforcement of his claim. *Vigilantibus non dormientibus subvenit lex*. But in such statutes there are always exceptions made in favor of persons who are during the limited time under disabilities, such as under age, imprisoned, insane, or under coverture. Therefore, where the operation of the statute is invoked as a bar to an action the plaintiff may reply that he was during that period within one of the excepted classes against which the time mentioned in the statute did not accrue. In *Burnham v. Mitchell* (34 Wis. 117), an action upon a note was brought by the administrator of a deceased lunatic payee against the maker, eleven years after the maturity of the paper. The note was payable in installments at different times between the years 1854 and 1863. It appears that a portion only of the indebtedness represented in the note was actually paid, but the defense was based upon an alleged settlement between the parties to the note, pursuant to which the note was delivered up to the maker and canceled. These facts, together with the mental incapacity of the payee at the time of the settlement being substantiated, it was held that the plaintiff might show the continued obligation of the note by evidence that the payee was insane or *non compos*, and incapable of contracting at the time of such alleged settlement, and that the question of incapacity to contract in such a case, was one for the jury. That the word "insane" in the statute of limitations was not to be confined to persons "wholly without

understanding" but that it must be construed to include every person who is *non compos*, or of "unsound or deranged mind" as that phrase is used in the statute of wills. Therefore, as a logical conclusion, if the payee of a note, when a cause of action therein arises in his favor, has not sufficient mental capacity to understand what he is about, or is incapable, by reason of mental unsoundness, of managing his affairs, the six years' limitation does not begin to run.

And so far as the principle of the restoration of the parties to the status *ante quo* is concerned, and where the contract seemed so entirely executed that entire restoration was practically impossible, it was held that the fact of property being delivered by the defendant to plaintiff's intestate upon the settlement, and which cannot now be restored, was no reason why the settlement should not be avoided, the defendant meanwhile being credited with the value of such property.

A similar doctrine was laid down by the Supreme Court of the United States in *Allore v. Jewell* (4 Otto, 506), where the purchaser of an estate from a weak-minded woman nearly insane, upon a defeasance of his title on the ground of fraud, was credited with the improvements made thereon as a set-off to the value of its rental while in his possession.

It was also held in the case first above cited, that the plaintiff was not bound to resort to an equitable action to annul the settlement before bringing his action at law to recover the debt, which had never in fact been discharged by any binding contract. This was re-affirming the principle laid down in *Mather v. Hutchinson* (25 Wis. 27).

OF HABEAS CORPUS IN BEHALF OF PERSONS CONFINED IN ASYLUMS.

The writ of *habeas corpus* being issued by courts of competent jurisdiction as a ministerial and not as a judicial duty upon reasonable cause shown, are not addressed to the merits of the case so much as to the legality of the confine-

ment. It is not, properly speaking, a writ of error, and cannot be used to oust another competent and already acting jurisdiction. (*Hurd on Hab. Corp.* 335.) Now a person legally confined in an asylum is within the custody of a competent jurisdiction. Therefore, under the maxim that *omnia præsumuntur rite esse acta*, it follows that, before a writ of *habeas corpus* can issue in his behalf, it is necessary to allege either that he was illegally committed and in violation of the forms prescribed by the statute, or that he is not now insane. Accordingly it has been held in England that, in order to obtain a *habeas corpus* to bring up a person confined in an asylum, it was necessary that the affidavit should show that he was in a fit state to be removed, and was not a dangerous lunatic. (*Ex parte* ——— 3 *Dow. Pr. C.* 161.) The current of American authorities may be said to flow in harmony with this doctrine. (*See Tit. 1, Art. 1, "Legal Commitment."*)

In relation to the duty of superintendents of asylums against whom a writ of *habeas corpus* is issued, commanding them to produce the body of a person held in their custody, it is incumbent upon them to do one of two things, viz.: either to hold the relator until the return day, and produce him, as ordered before the court, or else to discharge him. Confinement on the ground of mental disease is not like confinement for any criminal matter. If a person has been detained on the former ground his keeper may, therefore, discharge him, if satisfied of a cure, after service of a *habeas corpus* and before its return, and this will not be a contempt of court, because the moment the patient is cured he is entitled to his liberty, and if the superintendent is satisfied of his restoration to reason before the return day of the writ he must discharge him. (*Comm. v. Kirkbride*, 1 *Brewst.* 541.) An action for false imprisonment will find a foundation in any unlawful restriction upon personal liberty for however short a time exercised, and even carry-

ing him to the court-house to answer the writ, would be a deprivation of liberty *pro tanto*.

But the return to the writ must not be evasive or equivocal or it will constitute a contempt (*Matter of Stacy*, 10 Johns. 328), and where the person is not produced in court, the return should deny the custody, possession or power over the relator. And if the relator request the respondent to discharge him after service and before the return of the *habeas corpus*, and the relator appear in person and at liberty on the return of the writ, he cannot except to the return as insufficient or equivocal.

SUITS AGAINST LUNATICS.

It was an early rule of our Court of Chancery that a creditor might file his bill for a debt of the lunatic against the committee alone and without joining the lunatic. (*Brasher v. Van Cortland*, 2 Johns. Ch. 242; *Beach v. Bradley*, 8 Paige, 146.)

And under the practice of that court the proper course for a party who had a claim against a lunatic or his estate, after office found, was to apply to the court by petition for the payment of the debt, or for leave to bring suit for recovery of the same. (*Matter of Hopper*, 5 Paige, 489; *Soverhill v. Dickson*, 5 How. Pr. 109.) An action at law against the lunatic, begun without the permission of the Court of Chancery, would be restrained, and the plaintiff compelled to come into a court of equity for relief. (*Matter of Heller*, 3 Paige, 199.) Should even a judgment be obtained at law against a lunatic, without such leave, no benefit would accrue from it, although the court of law in which such action was brought had made no inquiry whether such leave had been first obtained. (*Robertson v. Lain*, 19 Wend. 649; *Clark v. Dunham*, 4 Den. 262; *Sternburgh v. Schoolcraft*, 2 Barb. 153.)

Wherever an action is brought against the committee of a lunatic, the fact of his appointment, the authority under

which he is acting, and the legal status of the person whom he represents, must all be set forth, otherwise the complaint will be defective and held bad on demurrer. (*Hall v. Taylor*, 8 *How. Pr.* 428.) This is only the converse of the principle applicable to the committee, when he is himself acting as plaintiff in behalf of his lunatic ward.

But the committee being an officer of the court cannot be sued without leave first had and obtained for that purpose. And in all cases where a creditor has a claim against a lunatic's estate, it will be necessary for him to make application to the court by petition for the enforcement of his claim, if such a lunatic has a committee. (*Williams v. Estate of Cameron*, 26 *Barb.* 172.) For, after a person has been judicially declared a lunatic it is a contempt of court for a creditor or other person, who has knowledge of the same, to sue the lunatic or to levy an execution upon his property, or in any wise to interfere with it, without the permission of the court. (*Ibid.*; *L'Amoureux v. Crosby*, 2 *Paige's Ch.* 422; *Matter of Heller*, 3 *Ib.* 199; *Matter of Hopper*, 5 *Ib.* 489.) Upon proper application by the committee such creditor or other person will be restrained from all interference with the property of his lunatic ward.

A lunatic may be sued as well after, as before a committee has been appointed over him, and a judgment may be recovered and enforced against him in the same manner as if he were sane, provided such proceedings are not restrained by the court. For being its ward, it may treat such an action as a contempt, whenever the same has been undertaken without its express sanction. (*Brown v. Nichols*, 9 *Abb. Pr.* [*N. S.*] 1.) Hence a judgment recovered against such a party after appointment of a committee of his person and estate, without first obtaining leave from a court of equity to institute a suit against him, is not void, nor even erroneous, nor is the party acting under it a trespasser. The remedy of a lunatic thus improperly proceeded against is by application to the court appointing the committee, to

restrain the prosecution of the suit at law and to punish the plaintiff for contempt. (*Crippen v. Culver*, 13 *Barb.* 424; *Sternberg v. Schoolcraft*, 2 *Ib.* 153; 8 *Ib.* 552.)

A court of equity will not, however, interfere to disturb a judgment recovered against a lunatic by due process of law, unless the consideration has been impeached and no other remedy has existed. And where a committee has full knowledge of the suit against his lunatic ward, and a full opportunity to apply for an order restraining such proceeding at any stage previous to execution, his neglect to do so is laches, and he will not be permitted afterward to maintain an action for the restoration of property sold under such execution. (*Crippen v. Culver*, 13 *Barb.* 431.)

In all suits against a *non compos* service of summons upon one with whom the lunatic or person of unsound mind resides is not a good service. It should be upon the defendant himself, and if he has a committee, such summons should be served upon him also. (*Code of Civil Procedure*, § 426.) Previous to the Code, if the lunatic had a committee whose interests were not adverse to his, the committee could be appointed guardian *ad litem ex parte* and of course. When there is no committee of a person of unsound mind who is sued, a guardian *ad litem* can be appointed on the application of the plaintiff, or on the application of some relative. If the application is made by a relative, notice thereof should be given, unless the bill or complaint states that the defendant is a lunatic. But where the complaint does not state that the defendant is a lunatic, notice should be given because the plaintiff should have an opportunity to know why the suit is defended by a guardian. (*Heller v. Heller*, 6 *How. Pr.* 194.)

Therefore, where in a partition suit one of the defendants was an infant idiot, and no summons was served upon him or any person representing him, and no notice was taken in the complaint of his disability, and a guardian *ad litem* for him was appointed upon the petition of his guardian

resident in Ohio, the idiot not being within the jurisdiction of our courts, and not being proceeded against by publication of a summons, which would have given the court a statutory jurisdiction, it was held that the Ohio guardian could not by his petition give the court any jurisdiction over the idiot's property in this State, and that a judgment against the idiot in this State was a nullity. (*Rogers v. McLean*, 31 Barb. 304.)

In order, however, to protect the legal rights of creditors, leave to proceed against the committee should not be denied when the party applying shows a case whereon, if established, a court of equity would grant relief. (*Matter of Wing*, 5 T. & C. 205.)

Where application is made by a creditor to a committee for payment of any claim against his ward, and the same is disputed, the proper course is to petition the court for payment out of the lunatic's estate, or for leave to establish the claim in such way as the court may direct. This will be either by action, or by reference, as may seem most proper under the circumstances. It is usual to order a reference as being less costly and more directly under the control of the court. And the court may, therefore, in its discretion deny an application for leave to sue the committee, and direct the appointment of a referee to take proofs as to the facts and to report thereon; or, if some particular advantage is to be gained by an action, it may grant leave accordingly to institute one. (*Williams v. Estate of Cameron*, 26 Barb. 172.)

Should a reference be ordered, it must proceed in the ordinary way and be governed by the rules of the court appointing the same.

Accordingly, upon the coming in of the referee's report, the same shall be filed with the testimony, and a note of the day of filing shall be entered by the clerk in the proper book, under the title of the cause or proceeding, and the said report shall become absolute and stand as in all things

confirmed, unless exceptions thereto are filed and served within eight days after service of notice of the filing of the same. If exceptions are filed and served within such time, the same may be brought to a hearing at any special term thereafter, on the notice of any party interested therein. (*Supreme Court Rules, No. 39.*)

In *Beach v. Bradley & Lay* (8 *Paige*, 146), where, upon the application of the creditor of an habitual drunkard, the court directed the committee to pay the amount due, together with the costs of the application, out of the estate, of the drunkard; and authorized the committee, if necessary, to sell the real estate for the purpose of raising funds to pay the debt; and further authorized the creditor to file a bill against the committee to recover his debt, in case the order was not obeyed, it was held that the part of the order authorizing the filing of a bill after the debt had been liquidated and settled, and decreed to be paid by the previous part of the order, was erroneous as subjecting the estate to the costs of a needless litigation. The proper course was to compel the committee to comply with the order by summary proceedings against him.

It was also held that, where it is necessary for the creditor of a lunatic to file a bill against his committee to establish a debt and to obtain satisfaction therefor out of the estate of the lunatic, then such lunatic might be made a party to the suit so as to make the proceedings binding upon him, in case he should be restored to the possession and control of his estate before the termination of the suit.

The fact that one of the parties, interested in the partition of an estate, is an infant or lunatic, will not deprive other parties in such interest of their right to a partition and sale of the premises so held in common by them. But before the interest of the infant or lunatic therein can be disposed of, and his title vested in a purchaser, he must in some proper form be brought before the court and his rights be passed upon and protected. If, in bringing the ward into court,

or in the proceedings before the court, there has been any irregularity, that may be cured by subsequent amendment under the order of the court having jurisdiction of the parties and the subject-matter. (*Rogers v. McLean*, 34 N. Y. 536.)

In Pennsylvania, the creditor of a lunatic who obtains judgment after inquisition does not acquire thereby any right of priority over the other creditors. (*Wright's Appeal*, 8 Barr. 57.) And under the Revised Statutes of New York, the committee of any lunatic is required to pay all debts in an equal proportion, but without regard to legal priority. (2 R. S., p. 852, § 21.)

Amendments in the new Code of Civil Procedure affecting suits for and against lunatics.

By section 426 of the new Code of Civil Procedure the service of a summons upon a person judicially declared incompetent to manage his affairs, and for whom a committee has been appointed, must be made upon the committee and the defendant.

By section 428 the court may at any stage of an action appoint a special guardian *ad litem* to conduct the defense of an incompetent defendant, to the exclusion of the committee, and with the same powers and subject to the same liabilities, as a committee of the property.

By section 554 neither a lunatic, an idiot, nor an infant under fourteen years can be arrested in a civil action, or if arrested may be discharged as a privileged person, in the discretion of the court.

By section 895 an open commission will not issue where the adverse party is an infant or the committee of a person judicially declared incompetent to manage his own affairs.

By section 1291 the time during which a party remains insane, is not considered part of the time limited for certain motions to set aside a judgment.

EFFECTS OF LUNACY ON LEGAL PROCEEDINGS.

A person *non compos mentis* cannot commit an act of bankruptcy while his disability lasts. But if he has done so previous to his lunacy he may be made the subject of a commission of bankruptcy. (*Anon.*, 13 *Ves.* 590; *Stock. N. C.* 38.) Nor can he prove debts under a commission of bankruptcy. (*Ex parte Clark*, 2 *Russ.* 575.) He may also be arrested and cannot be discharged if after such arrest he becomes insane, because the arrest is only part of the civil remedy intended to secure the presence of the defendant to answer further proceedings against him. (*Kernot v. Norman*, 2 *T. R.* 390; *Bush v. Pettibone*, 4 *N. Y.* 300; *aff.*, 5 *Barb.* 273; *Case of Wm. Hoffman*, *ch.* 322, *Laws of* 1872.) In like manner a lunatic is not exempt from surrender by his bail, unless danger to his safety or that of others would result from it, and by parity of reason the bail are not exempted by their principal becoming insane. (*Cock v. Ball*, 13 *East*, 355; *Cavanagh v. Collett*, 4 *B. & A.* 279; *Ibbotson v. Ld. Galway*, 6 *T. R.* 133; *Steel v. Allan*, 2 *Bos. & Pul.* 362; *Shelford*, 533.) The bail, however, may have a writ of *habeas corpus*, directed to the keeper of an asylum, to bring up their principal notwithstanding his lunacy, in order to surrender him in their discharge to the warden or marshal of the prison. (*Pillop v. Sexton*, 3 *Bos. & Pull.* 550.) A lunatic may also be brought up on *habeas corpus ad justificandum* and upon affidavit that he is not dangerous, but in a fit state to be brought up. But where the return to a writ of *latitat* stated that the defendant was insane, and could not be removed without great danger, and continued so until the return of the writ, the court of King's Bench refused an attachment against the sheriff and left the party to his remedy by action. (*Fennell v. Tait*, 5 *Tyr.* 218; 1 *C., M. & R.* 584; *Shelford*, 533; *Cavanagh v. Collett*, 4 *Barn. & Ald.* 279.)

TITLE EIGHTH.

COSTS OF PROCEEDINGS IN LUNACY.*

The general rule is that the prosecutor of a commission of lunacy undertaken in good faith, is entitled to be reimbursed from the lunatic's estate the costs and expenses properly incurred. (*Stock. N. C.* 126; *Shelford*, 133; *Clark's Case*, 22 *Penn. St.* 466.) This is fully recognized in the practice of our courts, and provided for by the 86th rule of the Supreme Court, which recites that the committee of a lunatic, idiot or drunkard may pay to the petitioner, on whose application the commission was issued, or to his attorney, the costs and expenses of the application, and of the subsequent proceedings thereon, including the appointment of the committee, and without an order of the court for the payment thereof, when the bill of such costs and expenses has been duly taxed and filed with the clerk in whose office the appointment of such committee is entered, provided the whole amount of such costs and proceedings does not exceed fifty dollars. But where the costs and expenses exceed fifty dollars, the committee shall not be at liberty to pay the same out of the estate in his hands without a special order of the court directing such payment.

It is not a matter of course to give costs against the petitioner for a commission of lunacy, even when he fails to obtain an inquisition finding the existence of the alleged lunacy. On the contrary, if the petitioner has proceeded in good faith and upon probable cause, he will not be charged with costs. As the petitioner must bear his own

* Some idea of the costs of commissions in England may be formed from the following exhibit: *In the Matter of Sir Henry Meux* the costs amounted to £6,941, or about \$34,000. *In the Matter of Mrs. Cumming*, whose insanity was manifested the moment she appeared before the jury, the costs were £5,000, or about \$25,600, and *In the Matter of Windham* the trial of the issue occupied 32 days, and cost *each side* £15,000, or \$75,000, thus amounting in the aggregate to \$150,000. (2 *Taylor's Prin. & Pract. of Med. Jur.*, p. 534.)

costs if he fails in establishing the lunacy, that, in general, is sufficient to restrain the prosecution of an unfounded charge of lunacy where there is no probable cause for the proceeding.

But the fact that a jury legally and properly impaneled has found the party proceeded against mentally incompetent for the management of his property, is sufficient *prima facie* to show that the petitioner had probable cause for his application for a commission, although another jury, upon the trial of the issue, found the other way. (*Matter of Giles*, 11 *Paige*, 638.) Therefore, where the relatives of a habitual drunkard prosecute a commission against him in good faith, they will not be charged with costs, although the prosecution should be unsuccessful, for in applications of this kind the prosecutors are not chargeable with costs, unless they have proceeded in bad faith and without probable cause. (*Matter of Arnhout*, 1 *Paige*, 497; 1 *Collinson*, 461.)

The committee is entitled to the legal expenses incurred in the proceedings on the inquisition, and also in opposing the traverse of it before the referees, and this includes the bill of the attorneys of the committee, and a reasonable counsel fee upon the trial of the traverse, and all disbursements which may have been properly made, to be paid out of the funds of the estate in the hands of such committee. (*Matter of Clapp*, 20 *How. Pr.* 385.)

Where counsel appears in behalf of a person against whom a commission of lunacy is issued, to oppose the same and does so unsuccessfully, such counsel has no legal claim against the estate of the lunatic on the ground of contract, as the party who is really a lunatic has not been benefited thereby, and was, besides, incompetent to contract. Nevertheless the court may, in its discretion, allow costs for opposing a commission, where the fact of lunacy is so much a matter of doubt that it would have directed and sanctioned such opposition if an application had been

made to it in the first instance. (*Matter of Conklin*, 8 *Paige*, 450; *Shelf. on Lunacy*, 103.) In Pennsylvania an action will not lie against the committee by the attorney who conducted the proceedings for his professional services, but the estate is liable therefor, in his hands. (*Wier v. Myers*, 34 *Penn. St.* 377.)

But neither money advanced nor compensation for services rendered to a lunatic can be recovered from him if the circumstances were such as to put the party upon inquiry as to his mental condition. Hence, in proceedings to have a person declared a lunatic, or to traverse or supersede a commission, the costs rest in the sound discretion of the court, and will not be granted unless the proceedings are instituted for the benefit of the lunatic, and are prosecuted fairly and in good faith. (*Matter of Beckwith*, 3 *Hun*, 443.)

The question of costs is always discretionary with the court, and depends upon the character of the application and the conduct of the party. The rule by which courts will govern their action in such cases is well stated by Chancellor WALWORTH in the *Matter of Tracy* (1 *Paige*, 583). It is that "the court must exercise a sound discretion, regulated by the particular circumstances, so that while the party proceeded against is not deprived of the means of protecting his legal rights, the property which is necessary for the support of himself and his family may not be unnecessarily wasted in useless litigation." In *Folger's Case* (4 *Johns. Ch.* 170), Chancellor KENT charged the whole costs of an unsuccessful traverse upon a third party, at whose instance the issue was awarded. In that case a relative of the lunatic had procured a deed from him, while a lunatic, and a few days only before the inquisition had been found, and his interest in establishing that deed, and not humanity, as the court remarked, was the motive for the traverse to the inquisition. And, as he was struggling for his own advantage, it seemed but just that

he should pay the costs to which he had, without just ground and in furtherance of his claim, subjected the estate of the lunatic.

In *McLean's Case* (6 *Johns. Ch.* 440), which was on the petition of a lunatic for the discharge of his committee, on the ground of returned sanity, and where the lunacy was satisfactorily established in the first instance, and the opinion of the court, after repeated applications for the discharge of this committee, remained unchanged, the trial of the question was directed to be at the expense of the lunatic or his friends, and not at the charge of his estate, which consisted of personal property only, acquired by the skill and industry of his wife, and barely sufficient for the maintenance of herself and children and of her husband.

Where the party applying for the traverse is not only the lunatic himself, but his estate is large and can bear the expenses of trying such issue, the court will generally make a suitable allowance to defray all proper expenses, and the committee will be directed to pay such sums as may be necessary to secure the attendance of witnesses and to remunerate counsel for their services before the court and jury. (*Matter of Tracy*, 1 *Paige*, 583; *Matter of Russell*, 1 *Barb. Ch.* 42.)

In the *Matter of Colah*, the Parsee merchant (3 *Daly*, 529; 11 *Abb. Pr.* [*N. S.*] 209), the court directed the committee of the lunatic, who was a Hindoo, to accompany him to India and to pay out such sums as might be subsequently directed by order to defray the expenses of the journey from New York to Bombay, in order to place him in the custody of the proper court there. The costs of so doing were computed at over four thousand dollars, and they were made a charge upon the estate of the lunatic.

In all cases referred to above the costs, when taxed, are to be regulated according to the terms prescribed by the Code.

CHAPTER SEVENTH.

OF MENTAL DISABILITIES AND THEIR EFFECTS UPON
CIVIL RIGHTS.

It is a principle of universal recognition that to constitute a valid contract there must be present in both parties an appreciative and an assenting mind. These are indispensable conditions precedent to the execution of any legal agreement, and the absence of either is fatal to its validity. All presumptions favoring mental sanity as the natural condition of men, it follows that the essence of a contract is the assent of both parties to the same thing in the same sense. (1 *Parsons*, 310, 475; *Dana v. Monroe*, 38 *Barb.* 528.) Hence one must be capable of giving his consent, and consequently must have the use of his reason in order to be able to contract. (*Pothier on Oblig. Pt. 1, Ch. 1, § 1, Art. 1.*) For this assent pre-supposes a full and satisfactory comprehension of the terms of the contract in its extent and its limitations, a knowledge of the mutual duties imposed upon the parties, and lastly an acquaintance with the advantages which are likely to accrue to each from the transaction, although this is not designed to express equal knowledge interchangeably of each other's advantages, but simply that each shall be capable of appreciating the benefits arising on his side from participation in the contract.

But while assent may be formally given, and an apparent appreciation of the terms of the contract be thus exhibited, they may yet all emanate from a condition of mind which did not without extrinsic assistance, or importunity, or undue influence, surrender such assent. While courts cannot draw geographical lines around degrees of intelligence, nor invent algebraic formulæ by which to measure with the

nicest exactitude the powers of appreciation of those entering into contracts, it is nevertheless their duty to protect those who are of unsound mind against the consequences of their own acts, whenever such acts are shown to be injurious to their interests. What constitutes an unsound mind becomes therefore at times a subject of very difficult determination, because each court is at liberty to adopt its own standard, and it is only by comparing decisions and finding the foundations common to all that we can deduce any conclusions of a definite character.

It is manifest at the outset that idiots and lunatics have, legally speaking, no mind, and cannot, therefore, be said to "agree in mind," in the sense necessary to form a contract. They are incapable of binding themselves absolutely and their acts will be subject to revision and abrogation. They differ from infants in this sense that an infant may make a contract (not being at law mentally incapacitated), which he may affirm or avoid upon coming of age, while in the eye of the law a lunatic is incapable of contracting because he is as one civilly dead, and may plead his own incapacity in bar of judgment. (1 *Chitty on Cont.* 131; 1 *Parsons*, 385.)

The principle that a lunatic cannot enter into any contract nor execute a valid conveyance has never changed since the earliest days of English jurisprudence. Thus COWELL (*Instit. Juris. Angl.*, *Lib.* 2, *Tit.* 7, § 4), and BRAC-
TON (*Lib.* 3, *Ch.* 2, § 8), both lay it down as an established rule that "a deaf-mute cannot make a gift, because he cannot express his consent to a gift, and for the same reason a lunatic or any person of unsound mind, unless he enjoys lucid intervals." And again, that "a lunatic cannot bind himself by contract, nor transact any kind of business, because of his incapacity to comprehend the nature of the transaction. Neither can an infant, nor one who is like unto an infant, and who in this respect does not much differ

from a lunatic, unless the contract be for his benefit, and authorized by his tutor."

The only exception to this rule is that relating to necessities, as explained hereinafter.

UNDETECTED LUNATICS.

In relation to dealings with insane persons before office found, and who do not present in their demeanor such conspicuous symptoms of their infirmity as to give notice or even awaken suspicion of their mental condition, the maxim *de non existentibus et non apparentibus eadem est ratio* will fully apply, and their contracts, where no fraud has been practiced, will be binding upon them. A party dealing with another, who exhibits nothing in conduct or speech revealing unsoundness of mind, has a right to believe him sane. For, in the absence of any notice or judicial record of the insanity, what means has he of ascertaining it? A merchant is not bound to demand proof of a customer's mental competency before dealing with him. If nothing points to an opposite condition he is not bound to assume it, merely because the party is a stranger and therefore personally unknown to him. So masked indeed is the character of insanity at times, that lunatics may behave in a manner becoming the most experienced business man—may buy or sell, draw bills or promissory notes, or execute conveyances without in any manner revealing their mental derangement. A man accustomed to the transaction of business may, although insane, perform an act of habitual occurrence in such a perfunctory way as not to betray in the least degree his unsoundness.

From this it will be readily perceived that any one incurs the risk daily of dealing with an undetected lunatic. If such a party, therefore, could be allowed to profit by a contract only so long as it suited his interests, and when it ceased to do so could immediately rescind it on the ground of his insanity, then there would cease to be any mutuality

in contracts even though sustained by a full consideration. But such a doctrine being opposed to reason and justice has never found supporters. Hence where a contract not unconscionable in itself has been executed between parties one of whom, unknown to the other, was at the time insane, the insanity will not be a defense to an action upon it, even though a subsequent finding in lunacy should over-reach in time the date of such contract.

This principle was fully vindicated in a recent case in Pennsylvania, (*Lancaster Co. Bank v. Moore*, 78 Penn. 407; *S. C.*, 21 *Am. Rep.* 24), where defendant desiring to borrow money gave his note to a third party who had it discounted at plaintiff's bank and the money deposited to defendant's order. Afterward an inquisition of lunacy found the defendant to have been a lunatic from a period of time anterior to the making of the note. It was shown that the plaintiff had no notice of the defendant's lunacy. Upon these facts the court held that the insanity was no defense to the action upon the note. And it rested its decision upon the judgment rendered in *Beals v. See* (10 *Barr.* 56), wherein it was held that an executed contract by a merchant for the purchase of goods could not be avoided by proof of insanity at the time of the purchase, unless a fraud was committed upon him by the vendor, or he had knowledge of his condition. The principle may therefore be considered as settled both in this country as well as in England, that while contracts made with insane persons are in general voidable, they are subject nevertheless to the qualification that a contract made in good faith with a lunatic for a full consideration and which has been executed without knowledge of the insanity, or such information as would lead a prudent person to the belief of the mental incapacity, will be sustained. (*Matthiessen v. McMahon*, 38 *N. J. L.* 536; *Lincoln v. Buckmaster*, 32 *Vt.* 652; *Yauger v. Skinner*, 1 *McCarter*, 389; *Elliott v. Ince*, 7 *De G. M. & G.* 475; *Price v. Berrington*, 7 *Hare*, 402; *Wilder v. Weakley*, 34 *Ind.* 181.)

But as many insane persons exhibit diminutions or abeyances of their disease, and others again are only periodically insane, the disease in them being of a recurrent character, and during all which stages of remission, known in law as lucid intervals, they may perform rational acts in a rational manner, the validity of an act then performed by them will depend upon the degree of mental lucidity possessed at the time. Where the degree attained is sufficient for the correct performance of the act, the act will stand, because the law does not demand absolute soundness of mind. Hence where a person subject to temporary insanity, sold, during a lucid interval, property for a full price, for the payment of urgent debts and with the knowledge of his friends, it was held that he was not entitled to have such sale set aside. (*Jones v. Perkins*, 5 B. Monr. 222.)

In accordance with these now well-established principles it may be said that the rule both in law and equity as to a contract entered into by a person apparently of sound mind and not known by the other contracting party to be insane is, that such a contract if fair, bona fide and completely executed, is valid, and even though such a contract might be void at law, it will only be set aside in equity for fraud. (*Hassard v. Smith*, 6 Ir. R. Eq. 429), and in order to vitiate a contract, the knowledge of the lunacy or incapacity must be, not merely actual, but presumably sufficient, from circumstances known to the other contracting party, to lead him to a reasonable conclusion that the person with whom he is dealing is of unsound mind. (*Ibid.*; *Beals v. See*, 10 Barr. 56; *Wilder v. Weakley*, 34 Ind. 181.)

It is not a matter of course for a court of equity to set aside contracts entered into and completed by a lunatic without any fraud in the parties dealing with him, even where such contracts are overreached by an inquisition, and might be void at law. And where it is impossible to exercise jurisdiction in favor of the lunatic so as to do justice to the other party, the court will refuse relief and

leave the lunatic to his remedy, if any, at law. (*Shelford*, 551.)

And in any event, although the fact of lunacy be judicially established, so as to render all contracts subsequently made by the lunatic void at law, a Court of Equity will not interfere to advance the plaintiff's remedy, unless the equities can be made equal and full justice be done to the defendant. (*Niell v. Morley*, 9 *Ves.* 478.) But if knowledge that he was dealing with an incompetent person can be brought home to the defendant, then equity will interfere to relieve the lunatic from the consequences of his acts. For a party making a contract with such a person is guilty of fraud. (*Will. Eq. Jur.*, p. 199; *Matter of Morgan*, 7 *Paige*, 236; *Blackford v. Christian*, 1 *Knapp's R.* 77.)

Yet where the paroxysms of insanity are only periodic, and the party generally recovers in the intervals, the presumption of incapacity does not apply, for a stranger is not bound to follow or inform himself of these varying conditions, where nothing in the demeanor or conduct of the alleged lunatic raises a reasonable doubt of his mental incapacity. His demeanor is the only standard by which to judge him. (*Carpenter v. Carpenter*, 8 *Bush*, 283; *Staples v. Wellington*, 58 *Me.* 453; *People v. Francis*, 38 *Cal.* 183.)

All decisions in courts both of law and equity show that although protection is always given to lunatics, the rights of other persons already accrued are not affected by the lunacy. Hence, specific performance of a contract by a defendant who afterward became a lunatic has been enforced. (*Owen v. Davies*, 1 *Ves., Sr.*, 80.)

The terms "idiot" and "lunatic" are not synonymous at common law, the former implying one born fatuous, the other one whose mind, from having once exhibited ordinary intelligence, has subsequently become impaired. It is to this class of persons alone that the terms *lunatic*, *insane*, and

non compos mentis properly apply. But in either event of idiocy or lunacy it is not necessary, in order to invalidate a contract made by one laboring under such an infirmity, that any imposition should appear to have been practiced upon, or some advantage taken of the party thus afflicted. Hence, it cannot avail any party seeking to enforce a contract against an insane person to show that, although aware of its existence, no advantage was taken of the lunatic. (*Seaver v. Phelps*, 11 *Pick.* 304.) But where a contract is made with a person not known to be of unsound mind, and who has not been found upon a commission *de lunatico* to be insane, the same may be sustained if it shall be proved to have been fairly made and without advantage having been taken of the lunatic. (*Matter of Beckwith*, 3 *Hun*, 443.)

So, also, where the contract is a fair one, and free from all imposition or fraud, it may, nevertheless, be enforced, particularly when executed, if the circumstances are such that the parties cannot be reinstated. And in any contract beneficial to a lunatic it has been held that the nature of the contract may be taken as *prima facie* evidence of a lucid interval, which is to say in fact that the law will treat a sane act as presumptive evidence of a sane mind. (*Moulton v. Camroux*, 4 *Exch.* 17; *Cartwright v. Ib.*, 1 *Phill.* 90; *White v. Driver*, 1 *Ib.* 84; *Williams v. Goode*, 1 *Hagg.* 579; *Macadam v. Walker*, 1 *Dow. Pr. C.* 148; *Booth v. Blundell*, 19 *Ves.* 508; *Neill v. Morley*, 9 *Ib.* 478.)

Thus, where the creditor of a lunatic has *bona fide* obtained a legal security and the lunatic's estate was benefited by the transaction, the court will not deprive him of such security without restoring to him as much as the estate of the lunatic has been benefited by the sale. (*Loomis v. Spencer*, 2 *Paige*, 153.) But in the case of purchases not completed, or whenever in fact it is possible to replace parties in *statu quo*, courts will interfere to set

aside such contracts upon proper evidence of existing lunacy at the time they were made, because in such cases the equities may be made equal. In *Yauger v. Skinner* (1 *McCart.* 389), it was held, by Chancellor GREEN, "that if the proof be clear that an executory contract to purchase was made in good faith, and for a full, fair price, when the lunacy of the vendor was neither known nor suspected, and that the contract was executed on the part of the purchaser without knowledge or belief of the existence of the incapacity of the grantor, the contract will be upheld." And in like manner in *Elliott v. Ince* (7 *De G. M. & G.* 475), Lord CRANWORTH held "that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those *who have dealt with him on the faith of his being a person of competent understanding.*"

The result of all the authorities is well stated by POLLOCK, C. B., in *Moulton v. Camroux* (2 *Exch.* 503), that "Where a person apparently of sound mind and not known to be otherwise, enters into a contract for the purchase of property, which is fair and *bona fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed and cannot be restored, so as to put the parties *in statu quo*, such contract cannot afterward be set aside, either by the alleged lunatic or those who represent him." So, also, in *Beavan v. McDowell* (9 *Exch.* 309), which was an action by a lunatic to recover back a deposit on a contract to purchase lands, and although in none of the pleadings was it alleged that any imposition was practiced or advantage taken of the lunatic, the defense resting solely upon the question of the knowledge of the mental unsoundness of the plaintiff possessed by the defendant, and by the rejoinder an issue being tendered on the averment of such knowledge, on demurrer to the rejoinder the pleadings were held to be good, and the case being tried on that issue, the plaintiff recovered. (10

Exch. 183). It will be noticed that in this case, the contract was executory, that it was not beneficial to the lunatic, and that the status *ante quo* could be restored.

But mere weakness of mind as measured by any ideal standard does not necessarily show unsoundness. There is no mind, however strong, which may not be shown to be weaker than some other in a particular department of intelligence. In *Hovey v. Chase* (52 *Maine*, 304), the court said that "a man may not have sufficient intelligence and understanding to manage his affairs and transact business in a proper and prudent manner, and yet may not be *non compos*. The law fixes no particular standard of intelligence as necessary to be possessed by parties in making a contract." It is evident that the maxim *non omnes omnia possumus* correctly expresses the natural condition of every mind, and shows conclusively that the strongest may be weak enough, or inexperienced enough in some directions, to be easily imposed upon. It is not over such, therefore, that the law casts the imputation of business incapacity or imbecility, else no one would be found legally competent. In respect, however, to those who are of weak understanding, generally, and not equal to the comprehension of the true nature or results of their business undertakings, the law exercises a guardianship over their interests proportioned to their necessities. "The acts and contracts of persons who are of weak understandings," says Judge STORY, "and who are thereby liable to imposition, will be held void in courts of equity, if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning or artifice, or undue influence." (1 *Story's Eq. Jur.*, § 238; *Hunt v. Moore*, 2 *Barr.* 105; *Miller v. Craig*, 36 *Ill.* 109.)

In determining, therefore, the validity of any contract which is sought to be avoided on the ground of mental incompetency, three facts are to be inquired into, viz. :

1st. The fact of the mental incompetency and the presumed knowledge of the opposite party.

2d. The fact of fraud or undue influence.

3d. Whether the contract be executory or executed, and whether things can be put in *statu quo*.

The value of these facts will best be illustrated by viewing them under the light of the following well-recognized principles of law :

1st. That the acts or contracts of a lunatic before office found are *voidable* only, and not necessarily void. Therefore, a lunatic is not absolutely disqualified from making a contract, and the law will, in certain cases, even raise one by presumption.

2d. That a lunatic may contract for necessities suitable to his condition.

3d. That legal liabilities may be enforced against lunatics and idiots, whether the mental incompetency has been judicially determined or not.

We will now examine these principles under the interpretation given them by the courts of New York :

1st. *The acts or contracts of a lunatic before office found are voidable only and not void. But after office found they are absolutely void.*

The border line between sanity and insanity is so wavering and shadowy that it is at times impossible to define it with exactness. A little more or a little less obscurity on this point or that may, according to the angle under which we view an act and its subject, impart a diametrically opposite character to them. All mental acts are but relative expressions of intellectual perception or moral liberty. Consequently they prove nothing absolutely, and the standard to judge them by must necessarily be one of averages between degrees. Sanity being always presumed, legal capacity therefore inheres as a consequence until insanity is judicially established. Pending this a person, however eccentric in manner or speech, may still exercise all

his civil rights, and parties dealing with him in ignorance of his real condition, and in good faith, will not be compelled to rescind their contracts when executed. For no one is legally a lunatic until that fact is established by due process of law. But even without there having been an inquisition of lunacy determining a party to be of unsound mind, there may be circumstances pointing to it, which, in a prudent man, should awaken caution in dealing. While a contract entered into under such conditions might be sustained in law, it would not be in equity, since fraud there may be presumed from the relative position of the two parties.

In *Jackson v. Gumaer* (2 Cowen, 552), it was held that a deed to or from a lunatic before office found is not void but voidable only, and one who is not in privity with the lunatic cannot object his insanity. And the following authorities were cited in support: *Co. Litt. b*; 2 *Bl. Comm.* 291; *Thompson v. Leach*, 2 Ventr. 198-208; *Webster v. Woodford*, 3 Day's Cas. 90; *Rice v. Peet*, 15 Johns. 503; 1 *Chitty's Plead.* 470; 1 *Ld. Raym.* 315; 3 *Mod.* 301; 1 *Collinson on Lunacy*, 413; 1 *Fonbl.* 42; *Vide also* 2 *Kent* 451.

In *Ingraham v. Baldwin* (9 N. Y. 45), the court said that a lunatic is not absolutely disqualified from making a contract, and in furtherance of this doctrine held that, independently of any expressed assent on the part of such a person, the law would, in certain cases, even raise one by presumption. (*Wentworth v. Tubb*, 20 Eng. Ch. R. 174.) Hence weakness of understanding does not in itself invalidate a contract, provided the party has memory and judgment to a moderate extent, and no fraud is shown. (*Jackson v. King*, 4 Cow. 209.)

And the question in all cases where incapacity to contract from defect of mind is alleged, is not whether a person's mind is impaired, nor whether he is afflicted by any form of insanity, but whether the powers of his mind have been so far

affected by his disease as to render him incapable of transacting business like that in question. (*Dennett v. Ib.*, 44 *N. H.* 531; *Creagh v. Blood*, 2 *J. & Lat.* 509.) For, it is an indisputable fact that an insane person may, and often does make an entirely reasonable contract, so far as terms and consideration are concerned, and it would only be opening the door to useless and costly litigation to allow the validity of such an agreement to be called into question upon the ground of mental incompetency, when this did not appear in the instrument itself, nor in any of the results attending its execution. Weakness of understanding being a question purely of degrees should not afford any objection to the validity of a contract, if the capacity remains to see things in their true relations, and to form correct conclusions. (*Osmond v. Fitzroy*, 3 *P. Wms.* 129.)

The rule as to what degree of derangement renders a party's act void *ab initio* always remains the same. That rule requires an entire loss of the understanding, and proof of a weak or even impaired mind or want of understanding on some occasions only is not sufficient. (*Person v. Warren*, 14 *Barb.* 488; *Petrie v. Shoemaker*, 24 *Wend.* 85; *Odell v. Buck*, 21 *Ib.* 142.) The party whose act is sought to be avoided must be of unsound mind, which in law means deficient in understanding generally. (*Davis v. Culver*, 13 *Dow. Pr.* 62; *Ball v. Mannin*, 3 *Bligh N. S.* 1; 1 *Dow's Pr. C. [N. S.]* 380.) Hence no distinctions are made between forms or phases of unsoundness by whatever name known, and idiocy, imbecility and insanity are placed upon a similar footing.

When insanity, however, is the only ground of defeasance claimed, the action should be brought in a court of law, because a lunatic is, in the eye of the law, as incapable of contracting except for necessities, as if he were naturally dead. (*Chitty on Cont.*, *Perkins' Ed.*, 137.)

If, on the other hand, weakness of understanding is the ground, it becomes one among the various ingredients

along with inadequacy of price and undue influence, which in equity constitute fraud. (1 *Story on Cont.*, § 76 ; *Story's Eq. Jurisp.*, § 238.)

The difference between law and equity in relation to the defeasance of contracts made by persons of unsound mind is thus seen to be founded in the law of relative as distinguished from absolute incapacity. In law a lunatic is absolutely disqualified from contracting except for necessities ; in equity, however feeble may be the understanding of a party, if not a lunatic, he is still only relatively incapable as against the ingredients of fraud before mentioned, but in the absence of these equity will not relieve, if no deception has been practiced, because one cannot be *non compos* in equity who is *compos* at law. (*Osmond v. Fitzroy*, 3 *P. Wms.* 129 ; *Lewis v. Pead*, 1 *Ves., Jr.*, 19 ; 1 *Fonb. Eq.*, 5th ed., 66, 68, note r.)

As to prior contracts which may have been overreached by the inquisition, this latter is only *prima facie*, and not conclusive evidence of incapacity, from the time the person is found to be of unsound mind. (*Hutchinson v. Sandt*, 4 *R.* 234 ; *Noel v. Karper*, 53 *Penn. St.* 97. See "*Inquest of Office and its Effects*" for full examination of this point.)

But after office found, which is presumptive notice to every one of a party's disability, any contract made with the lunatic is absolutely void and no action can be maintained by his committee upon it. (*Fitzhugh v. Wilcox*, 12 *Barb.* 235 ; *Pearl v. McDowell*, 3 *J. J. Marsh.* 658 ; *Wait v. Maxwell*, 5 *Pick.* 217 ; *Wadsworth v. Sherman*, 14 *Barb.* 169 ; *Wadsworth v. Sharpsteen*, 8 *N. Y.* 388 ; *L'Amoureux v. Crosby*, 2 *Paige*, 427 ; *Clark v. Trail*, 1 *Metc. [Ky.]* 39.)

Hence debts contracted by a lunatic or habitual drunkard, after the appointment of a committee and without his consent, cannot be paid out of the estate, although established by a suit at law against the drunkard or lunatic. (*Matter of Heller*, 3 *Paige*, 199.)

The pathway of these inquires is beset with difficulties

because each case has always some features peculiar to itself. No rule, however good in itself, admits of universal application. There will be cases to which it is only proximately appropriate, and yet, however wanting in adaptation, it may be the only one which can be appealed to under the circumstances.

"In border cases," said Judge HUNT, in the case quoted below, "it may be difficult to say what is sanity and what is insanity. Between sanity and insanity there is ample distinction. A course of action for a series of years entirely different from that governing mankind at large and different from his own former conduct and character, where the principles, feelings, emotions and grounds of action differ entirely from those we all recognize as governing ourselves, where the individual, without motive, abandons the better and higher parts of his nature, neglects civilization and refinement and comfort, and where this difference is permanent and marked; where the change in his intellectual capacity, from that of an educated, careful and attentive business man, is to one who is allowed no money except a trifle, like that which will please a child; whose property and person are entirely under the control of others, brutally exercised and uncomplainedly submitted to, who requires the daily care of his wife to shave him; who at length becomes an inmate of a lunatic asylum, confessedly insane, and who thence forward lives and dies a lunatic; all these circumstances indicate a clear case of insanity.

"A man may be certainly insane, although he be not either a raving maniac or an absolute imbecile. Nor is it necessary that a delusion which possesses him should at all times operate with the same force, or that his self-control should at all times be entirely lost.

"If a person has so little or such perverted intellect that he is unable to comprehend the subject before him, in its relation to himself, the party with whom he is dealing and others who have claims upon his justice or his bounty, his

contract ought not to be sustained. He may be able to restrain his violence for the moment, and to converse with discretion and judgment for a brief period, there may be remissions or mitigations of his disease and yet he be insane." (*Haviland v. Hayes*, 37 *N. Y.* 25, 1867.)

Conveyances by Lunatics.

The deed of one *non compos mentis* is absolutely void, although no fraud is alleged, and such incapacity had not been legally or judicially determined at the time of or prior to the execution of the deed. Nor is the plaintiff obliged to resort to a bill in equity to set aside the deed. Thus in *Van Deusen v. Sweet* (51 *N. Y.* 378), it was held that a deed executed by one *non compos mentis* — which the court in that case defined to mean "totally and positively incompetent" — is absolutely void; and that, where a defendant in an action to recover the possession of real property claims under such a deed, the fact of the incapacity of the grantor may be shown by plaintiff to defeat such claim, although no fraud is alleged and such incapacity had not been legally or judicially determined at the time of or prior to the execution of the deed. The court further held that an inquiry under a writ *de lunatico inquirendo*, stating that at the time of the execution of a deed the grantor was *non compos mentis*, is presumptive but not conclusive evidence of the grantor's incapacity in an action wherein a party claims under the deed. (*Thompson v. Leach*, 3 *Salk.* 300; *Estate of De Silver*, 5 *Rawle*, 111.) But the incapacity must be complete, for mere imbecility in a grantor, not amounting to idiocy or lunacy, is not sufficient to avoid his deed. (*Odell v. Buck*, 21 *Wend.* 142; *Sprague v. Duel*, 11 *Paige*, 480.) In the case of a mortgage, however, the equities connected with it remove it from the sphere of an actual conveyance, and the rule is that such an instrument, when made by a lunatic, is not absolutely void, but only voidable at the election of such lunatic or his personal rep-

representatives, or those claiming some interest under him in the premises. (*Ingraham v. Baldwin*, 9 *N. Y.* 45; *Allis v. Billings*, 6 *Metc.* 415; *Dennett v. Ib.*, 44 *N. H.* 531.)

Hence privies in blood and representation may avoid the avoidable deeds of infants and lunatics, while privies in law and estate cannot, and the subsequent purchaser from a lunatic vendor is such a privy by representation that he may avoid the prior deed against the privy in estate, whenever such deed might be avoided by the vendor or his heirs. (*Breckenbridge v. Ormsby*, 1 *J. J. Marshall*, 245; *Fitzhugh v. Wilcox*, 12 *Barb.* 235.)

In *Thompson v. Leach* (*Carth.* 435; *S. C.*, 2 *Salk.* 427), a distinction was made between a feoffment with livery *propriis manibus* of a *non compos* and his bare execution of a deed by sealing and delivering, the former being voidable merely, the latter absolutely void as to third parties. The reason for this distinction is stated by Shelford (*op. cit.* p. 336), to be that, in the case of feoffments, a particular solemnity attended the livery of seisin which was executed *coram paribus curtis*, who signed their attestation to the same, in evident affirmance of the mental capacity of the feoffor. Stock (*N. C. S.* 25) doubts that any such distinction ever existed and says that it rests upon the above case alone. However this may be, and although the conveyance by feoffment with livery of seisin has not been practiced in this country, the doctrine was favorably adverted to as a precedent in the case of *Rogers v. Walker* (6 *Barr.* 371), where the court held that a purchaser from a lunatic has no equity to be re-imbursed his purchase-money on the costs of improvements. And that, after the proof of insanity in the opinion of friends or the common report of the neighborhood, the burden of showing a lucid interval or sanity is upon the purchaser.

But, although the term *non compos* is generic and includes both idiocy and insanity, still it does not carry with it the idea of mere weakness of mind. For weakness implies a

sliding scale of variable degrees of understanding *quoad* this or that particular transaction, while *non compos* implies a total deprivation of capacity to perform the contested act understandingly. A person may therefore be an imbecile in various degrees, and yet not in law be *non compos*. His acts may be reviewable and nullified in equity, where they could not be impeached at common law. Hence, as was said in elucidation of this principle by Lord Chancellor LIFFARD in *Rochfort v. Ely* (1 *Ridg.* 532), there is no such thing as equitable insanity; it is a legal thing, understood according to a legal definition. A deprivation of sense and a total want of understanding to contract; a deprivation of a man's reason as is said by Lord HALE (*H. P. C.* 29-30.) In every case where mere imbecility is alleged, it should be of such a degree as to justify a jury, under a commission of lunacy, in finding the party unfit to manage his own affairs. But equity will often construe that to be fraud in a contract which arises merely from the unequal circumstances of the parties, and thus apply a specific remedy where the law could afford none. Hence, a degree of weakness of mind far below what would be necessary to justify a commission of lunacy, if it has been taken advantage of to procure the execution of a deed, will be sufficient ground to justify a court of equity in setting such deed aside. (*Blachford v. Christian*, 1 *Knapp*, 73.)

In a recent case, that of *Allore v. Jewell* (4 *Otto*, 506), the Supreme Court of the United States held that whenever there is great weakness of mind arising from age, sickness or any other cause, in a person executing a conveyance of land, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere and set the conveyance aside. The action here was brought by the heir-at-law of Marie

Genevieve Thibault, late of Detroit, Michigan, to cancel a conveyance of land alleged to have been obtained from her a few weeks before her death, when from her condition she was incapable of understanding the nature and effect of the transaction. The conveyance was of a quantity of land in Detroit, worth from six to eight thousand dollars, for the consideration of two hundred and fifty dollars cash and an annuity of five hundred dollars during the life of the grantor and payment of her physician's bills and the use of the house thereon, or the rent of such other house as she might occupy. At the time the conveyance was made the grantor lived alone in great degradation, and was in a condition of mind bordering on the line between sanity and insanity. A number of suspicious circumstances accompanied the transaction, and only the grantee and his agent and attorney were shown to be present at the time it took place. The court below refused a decree setting aside the deed complained of.

In reversing this decision the Supreme Court said: "It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities, she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances, imposition or undue influence will be inferred. In the case of *Harding v. Wheaton*, reported in the 2d of Mason, a conveyance executed by one to his son-in-law, for a nominal consideration, and upon a verbal arrangement that it should be considered as a trust for the maintenance of the grantor, and after his death for the benefit of his heirs, was, after his death, set aside, except as security for actual advances and charges, upon application of his heirs, on the ground that it was obtained from him when his mind was

enfeebled by age and other causes." "Extreme weakness," said Mr. Justice STORY, in deciding the case, "will raise an almost necessary presumption of imposition, even when it stops short of legal incapacity; and though a contract, in the ordinary course of things, reasonably made with such a person, might be admitted to stand, yet if it should appear to be of such a nature as that such a person could not be capable of measuring its extent or importance, its reasonableness or its value fully and fairly, it cannot be that the law is so much at variance with common sense as to uphold it.

The case subsequently came before this court, and in deciding it Mr. Chief Justice MARSHALL, speaking of this, and it would seem of other deeds executed by the deceased, said: "If these deeds were obtained by the exercise of undue influence over a man whose mind had ceased to be the safe guide of his actions, it is against conscience for him who has obtained them to derive any advantage from them. It is the peculiar province of a court of conscience to set them aside. That a court of equity will interpose in such a case is among its best-settled principles." The principle upon which the court acts in such cases of protecting the weak and dependent, may always be invoked on behalf of persons in the situation of the deceased spinster, in this case of doubtful sanity, living entirely by herself, without friends to take care of her, and confined to her house by sickness. As well on this ground as on the ground of weakness of mind and gross inadequacy of consideration, we think the case a proper one for the interference of equity; and that a cancellation of the deed should be decreed. (*Harding v. Handy*, 11 *Wheat.* 125.)

Mr. Justice STRONG dissented from the decision of the majority of the court, on the ground of laches on the part of complainant in instituting the action. But as to this point the court said: "The objection of the lapse of time, six years, before bringing the suit, cannot avail the

defendant. If during this time, from the death of witnesses or other causes, a full presentation of the facts of the case had become impossible, there might be force in the objection. But as there has been no change in this respect to the injury of the defendant, it does not lie in his mouth, after having in the manner stated obtained the property of the deceased, to complain that her heir did not sooner bring suit against him to compel its surrender. There is no statutory bar in the case. The improvements made have not cost more than the amount which a reasonable rent of the property would have produced, and the complainant, as we understand, does not object to allow the defendant credit for them. And as to the small amount paid on the execution of the conveyance, it is sufficient to observe that the complainant received from the administrator of the deceased's estate only one hundred and thirteen dollars and forty-two cents, and there is no evidence that he ever knew that this sum constituted any portion of the money obtained from the defendant."

It may be considered therefore as a settled principle, that conveyances resting upon a doubtful basis of mental capacity will always be scrutinized by courts of equity, because of the danger of fraud. And they will be set aside whenever a grantor can show that he was *non compos quoad* the particular act, at the date of the execution of the instrument. (*Bensell v. Chancellor*, 5 *Whart.* 371.)

There are cases also of peculiar hardship where a court of equity will set aside an improvident agreement made by a person in whom the mind and memory are so far impaired as to justify this protection *quoad hoc*, and yet where the court would not have the power to deprive such person of the right to the possession and control of his property on the supposition that he was a person of unsound mind. (*Matter of Morgan*, 7 *Paige*, 236). But irrespective of fraud and an unconscionable bargain, mere weakness and partial incapacity will not afford ground for the interposi-

tion of courts. And it has been held that a conveyance by one, whose mind without being actually unsound is yet impaired, will not be set aside where the consideration was fair and no fraud practiced. (*Sprague v. Duel*, 11 *Paige*, 480; *Will. Eq. Jur.* 199.)

It is otherwise, however, with an assignment which is a complete and absolute transfer of all the right, title and interest of the party making it. Where, therefore, a mortgagee is shown to have signed his name to an assignment of a mortgage when of unsound mind and incapable of executing a legal instrument, such assignment will be void, unless made valid by some other fact disclosed in the case. (*Marvin v. Inglis*, 39 *How. Pr.* 329; *Haviland v. Hayes*, 37 *N. Y.* 25.)

But how far the previous habits of mind of an individual are to be considered in estimating the legal quality of his acts, and how far particular acts are to be interpreted as the offspring of a latent rather than a patent infirmity, came up in an action upon a bond and warrant of attorney executed by a party who was subsequently found by inquisition to have been at the time of unsound mind. And it was held that such an instrument was not absolutely void, because it appeared in evidence that the alleged lunatic had been in the habit of transacting business, and there was no fraud or want of good faith charged. (*Person v. Bartlett*, 14 *Barb.* 488.)

Proof of competency to contract, like proof of general reputation, is so far a matter of opinion that it does not fall exclusively within the sphere of expert testimony. Any ordinary witness may also testify to the fact—and it has consequently been decided that upon a question of mental competency to make a contract, the opinions of those in habitual and daily intercourse with such person, are competent evidence. (*Beller v. Jones*, 22 *Ark.* 92.)

But the mere fact of the grantor's lunacy will not avoid a *bona fide* deed unless there can be restoration of the grantee

to the original state of things, since the equities would not be equal, and an unfair advantage would thus be given to the lunatic. He who seeks equity must do equity. (*Canfield v. Fairbanks*, 63 *Barb.* 461.)

A grantee whose conveyance is overreached by the inquisition will be permitted to traverse it, on stipulating to be bound by the final decision therein. (*Ex parte Christie*, 5 *Paige*, 242.) And where an issue has been awarded and a grantee, whose conveyance is overreached by the inquisition, has consented to join in it and to be bound accordingly by the result, the other parties are not at liberty to abandon the trial of the issue without the sanction of the court, nor to leave the validity of the lunatic's conveyance to be decided in some other mode. (*Ex parte Giles*, 11 *Paige*, 243.)

The court, in *Jackson v. King* (4 *Cowen*, 207), laid down the following propositions in elucidation of this entire subject, viz. :

Where an act is sought to be avoided on the ground of mental disability the burden of proof lies with him who alleges it.

Till the contrary appears, sanity is to be presumed. But after the insanity is proved, it is incumbent upon one who insists upon the validity of an act to show sanity at the very time it was performed.

Idiots and lunatics or persons *non compos* are in a mental condition to render them incapable of contracting.

One *non compos* is one who has wholly lost his understanding.

Not because a person is a fit subject for a commission *de lunatico* are his acts void or voidable in a court of law.

The question as to the validity of a deed executed prior to such a commission would not be affected by it. For, to affect a deed at common law, an entire loss of understanding must be shown. The common law has drawn no line to show what degree of intellect is necessary to uphold it.

Such a distinction is impracticable, but mere weakness of understanding is an item in the proof of fraud.

At law fraud must be proved ; in equity it may be presumed from the relative situation of the parties.

Weakness of understanding is not, in itself, any objection in law to the validity of a contract.

AGENCY.

Whatever a person has the power to do at law in his own right as principal he may do as agent. Contrari-wise, idiots, lunatics and persons of unsound mind, not being *sui juris*, are wholly incapable of appointing an agent. This is in full accord with the principles of the civil law by which a *non compos* was rendered incapable of contracting and could not delegate authority to any other to act for him. *Furiosus nullum negotium gerere potest, quia non intelligit quod agit.* (*Inst., lib. 3, tit. 20, § 3 ; Dexter v. Hall, 15 Wall. 9.*)

While it is also true that an idiot or a lunatic cannot, while acting as agent or attorney for any principal, do an act that shall be binding upon him, yet in the absence of any fraud or knowledge of the lunacy of an agent, on the part of those dealing with him in the line of his ordinary powers, the same rule must unquestionably be applied here as in all other cases of persons dealing in good faith with undetected lunatics. If an agent has authority to bind his principal, it must be because of the fact that he acts as the personal delegate of that principal's confidence and authority. Until, therefore, his authority so to act is revoked, or his lunacy is so patent that he who deals with him must be assumed to have discovered it, the acts or contracts of such an agent, though shown to have been performed by him while insane, will stand on the same footing as those of any other party, similarly circumstanced. And in obedience to this principle a power of attorney is not revoked by the lunacy of the party, until that fact is judicially established. (*Wallis v. Manhattan, 2 Hall, 495 ; Marvin v. Inglis, 39 How. Pr. 329.*)

For although the insanity of a principal operates *per se* as a revocation or suspension of the agency, yet where a consid-

eration has primarily been advanced in the transaction which was the subject-matter of the agency, so that the power becomes coupled with an interest, or where a consideration of value is given by a third person trusting to an apparent authority, and in ignorance of the principal's insanity, there the power will continue valid until legally annulled. (*Bunce v. Gallagher*, 5 *Blatch. C. C.* 481; *Davis v. Lane*, 10 *N. H.* 156; *Matthiesen et al. v. McMahon's Ex.*, 38 *N. J.* 536.) The above decisions are only equitable applications of the principle laid down by Story, that inasmuch "as the party himself during his insanity could not personally do a valid act, his agent cannot, in virtue of a derivative authority, do an act for and in his name which he could not lawfully do for himself." (*Story on Agency*, § 481.) Yet where such agent has personal capital embarked in the business of his principal he may protect his own interests by continuing the agency until legally annulled.

PARTNERSHIP AS AFFECTED BY LUNACY.

At common law insanity does not ordinarily amount to a dissolution of partnership, but only to a good and sufficient cause for a court of equity to decree a dissolution. (*Story on Part.*, § 295; *Wrexham v. Huddleston*, 1 *Swanst.* 514; 3 *Kent*, 66; *Jones v. Noy*, 3 *Myln. & Keen.* 125.) Each case must turn upon circumstances of its own, which seem to forbid any rule of universal conduct. Partnership, in its general sense, means such a variety of personal agreements that it is not always easy to say what are the qualifications necessary to be present in partners, in advance of knowing what are the objects of the convention, and what the part which each person has agreed to discharge, as his share for the common purpose. As some partners only furnish skill and personal services, and others again only capital, the standard by which to measure the sphere of duty of each to the firm must necessarily vary with the character of the contribution agreed to be made by the individual partner.

A man agreeing to furnish skill alone is not delinquent if he does not at the same time furnish capital and *vice versa*. And an insane silent partner whose capital is embarked successfully in a well conducted enterprise, cannot be said from the fact of lunacy alone to have withdrawn or withheld any thing, which, by the terms of his agreement, he had contracted to supply. Under such circumstances it will always rest in the discretion of a court of equity to determine whether lunacy alone shall operate to dissolve a partnership against the interests of all concerned.

In *Waters v. Taylor* (2 Ves. & Bea. 301), Lord ELDON observed that "if a case should arise in which it was clearly established, as far as human testimony can establish, that the party was what is called an incurable lunatic, and he had by the articles contracted to be always actively engaged in the partnership, and it was, therefore, as clear as human testimony could make it that he could not perform his contract, there could be no breach in consequence of the act of God; but it would be very difficult for a court of equity to hold one man to his contract, where it was perfectly clear that the other could not execute his part of it." It will be noticed that the court only assumed a case where the lunatic's *personal* services formed one of the conditions of the partnership agreement, but without determining what would be the effects of lunacy upon a silent partner. And we are led by inference to the conclusion that, if the interests of the lunatic's estate appear to be best subserved by allowing his share in the partnership fund to continue so invested, no dissolution would be decreed as a matter of course, but that the committee would be authorized to govern himself according as the remaining partners concluded to act.

In *Pearce v. Chamberlain* (2 Ves. 35), the master of the rolls stated, as to Huddleston's case before Lord TALBOT, that the court held that a temporary disorder of mind intervening should not dissolve the partnership; that the lunatic had not thereby forfeited the benefit under the partnership,

and notwithstanding the accident he should still be considered a partner. But in *Sayer v. Bennett* (1 *Cox's Ch. Cas.* 107), it was held that if a partner is so far disordered in his mind as to be incapable of conducting his business according to the terms of the articles of copartnership, a court of equity will dissolve the partnership. And in *Isler v. Baker* (6 *Humph.* 85), it was held absolutely that an inquisition of lunacy found against a partner dissolves *per se* the partnership.

These cases all proceed upon the principle that the partner's personal care and attention to the business of the firm are so indispensable that his lunacy is a direct injury to the interests of his copartners, and that to maintain the partnership would be to jeopardize both his interests and theirs. But suppose he is a silent partner who puts capital alone into the business of the firm, and no personal services or even his presence are required to conduct it, why should his lunacy any more than his absence in Europe cause a dissolution? In *Waters v. Taylor* it was held that one partner could not, on account of the lunacy of another, put an end to the partnership, but that such an object must be obtained through the intervention of a court of equity. Now if the copartners of a silent lunatic partner prefer not to apply for a dissolution, why should they be compelled to submit to one, if the committee of the lunatic can satisfy the court that it is for the interest of his ward not to withdraw his proportion from the funds of the partnership of which he is a member. In such matters the true doctrine would seem to be to consult the best interests of the lunatic's estate. And if the other partners of a lunatic continue business, enjoying the advantages of his capital, then the representatives of the lunatic have a right to his share of the partnership profits up to the time of its dissolution, or the sale of the business. For so long as he continues in the partnership there is no dissolution. (*Jones v. Noy*, 2 *My. & K.* 125.)

In the case of a surviving partner, who has become a lunatic, it has been held that he is, notwithstanding his lunacy, entitled by his committee to the custody and control of the partnership property, and thus may sue for the recovery of a debt due to the firm. (*Uberoth v. Union National Bank*, 29 *Leg. Int.* 92.)

But in any event a court of equity will not make its decree for a dissolution of partnership retrospective, so as to agree with the time when the insanity began, because, since it is the decree alone which dissolves the partnership, the date of the dissolution ought to be the same as the date of the decree. (*Besch v. Frolich*, 1 *Phill. Ch.* 172.)

MARRIAGE BY ONE NON COMPOS MENTIS.

It is a self-evident principle that idiots and lunatics cannot enter into a matrimonial contract, and any marriage, therefore, of a lunatic, not in a lucid interval, is as absolutely void as that of an idiot. The same doctrine obtained in the civil law, where a lunatic was adjudged incapable of consenting to any contract, and hence to one of marriage. *Furor contrahi matrimonium non sinit quia consensu opus est.* (*Dig., lib. 23, tit. 2, art. 2, § 3.*) Yet such marriages cannot be annulled without a judicial decision, for until a decree of nullity pronounced they are merely voidable. (*Stiles v. West, Siderf*, 112; *Ash's Case*, 1 *Eq. Cas. Abr.* 278, *pl.* 6; *Smart v. Taylor*, 9 *Mod.* 98; *Ex parte Turing*, 1 *Ves. & Bea.* 140.) In an early case in this State, that of *Wightman v. Wightman* (4 *Johns. Ch.* 343), it was held that although a marriage with a lunatic is absolutely void, yet, as well for the sake of the good order of society, as the quiet and relief of the party, its nullity should be declared by the decision of some court of competent jurisdiction. Hence where a person, insane at the time of her marriage, after a return to a lucid interval refused to ratify or to consummate it and filed her bill to annul it, the court decreed the marriage null and void and the parties absolved

from its obligations. In the above case the parties had never lived together, or in any way cohabited, and the marriage was consequently null and void by reason of the original incapacity of the plaintiff to contract, and her unwillingness since the return of her lucid interval to ratify or consummate it.

But pending an inquisition of lunacy a party may still make a valid marriage, for whatever may be the finding, the inquisition still remains only presumptive and not conclusive evidence of insanity, and this condition being a variable one is always open to review. It can have no permanency, therefore, as *res adjudicata*. Even where the inquisition over-reaches the date of the marriage, this fact will not invalidate it, since the court may find that the alleged lunatic was competent to enter into such a contract. Thus in *Banker v. Banker* (63 N. Y. 409), which arose upon an action by the heir and next of kin of John Banker, deceased, to annul a marriage between the deceased and the defendant, on the ground that the deceased was *non compos mentis* at the time of the marriage ceremony, it appeared that two days after the marriage an inquisition was found declaring that the said John Banker was at the time of unsound mind, and that he had been so for six months prior thereto. The court held, following *Van Deusen v. Sweet*, that the inquisition was only presumptive evidence of incapacity, and that the fact that proceedings under a writ *de lunatico inquirendo* were pending at the time of the marriage, and that the defendant had knowledge of the fact, did not affect the question. In that case the court below found as a fact that John Banker was of sound mind when the marriage took place.

Our statutes recognize the same foundations for marriage as obtain at common law, and they consequently recite that "marriage, so far as its validity in law is concerned, shall continue in this State a civil contract, to which the consent

of parties, capable in law of contracting, shall be essential. (2 *R. S.*, 6th ed., p. 147, § 1; *Clayton v. Wardell*, 4 *Comst.* 230; *Cheney v. Arnold*, 15 *N. Y.* 345; *Hayes v. The People*, 15 *Abb.* 163; 24 *How. Pr.* 452; *Turpin v. Public Adm.*, 2 *Brad.* 424; *Jacques v. Pub. Adm.*, 1 *Brad.* 509, 519.)

The absence, therefore, of such a degree of understanding as is necessary to constitute legal capacity to contract renders any marriage void. And although the language of the statute if strictly interpreted would render such marriage void only, "from the time its nullity shall be declared by a court of competent jurisdiction" (3 *R. S.*, p. 148, § 4), leaving it until then merely voidable, it has been held that such language, when so interpreted, is in palpable contradiction to the legal definition of marriage as given in the first section of the Statute, and should be restricted to marriages deficient in some of the minor ingredients of validity. (*Jacques v. Pub. Adm.*, 1 *Bradf.* 512-17.) "It is too plain a proposition to be questioned," says Chancellor KENT, "that idiots and lunatics are incapable of entering into the matrimonial contract, and that such a marriage is absolutely void. (*Wightman v. Wightman*, 4 *Johns. Ch.* 343; *Ferlat v. Gojon*, *Hopk. Ch.* 478, 498; *Doe v. Roe*, *Edm. S. C.* 344; 2 *Kent's Comm.* 41-2; *Browning v. Reane*, 2 *Phill.* 69 & 19; *McElroy's Case*, 6 *Watts & S.* 451.)

It is indifferent whether the party marrying an idiot, lunatic or imbecile, or even a person in a state of intoxication, knew, or was ignorant of the mental infirmity of such person at the time of entering into such contract. For in both cases the marriage is in the nature of a fraud upon one of the parties, and on that account is wholly invalid. And no assent of parties can purge it of its illegality, because so far as the idiot, or mentally unsound person is concerned, he or she has no legal capacity to consent, and an insane person can no more dispose of his person and property by marriage than by any other contract. (*Middleborough v. Rochester*, 12 *Mass.* 363; *Portsmouth v. Ibid.*, 1

Hagg. 355; *Jacques v. Pub. Adm.*, 1 *Brad.* 499.) In the language of Mr. Surrogate BRADFORD, in the last named case, "where there is no capacity, there can be no contract, no marriage, nothing to annul or dissolve."

The current of authorities in this State, following that of England, seems to show that the sentence of any court in cases of this kind does not dissolve the marriage, inasmuch as no lawful marriage can have taken place, but merely declares the fact that such marriage has been *ab initio* a nullity. (*Perry v. Perry*, 2 *Paige*, 501; *Groom v. Thomas*, 2 *Hagg.* 433; *Marsh v. Tyrrell*, *Ib.* 87; *Burtis v. Ibid.*, *Hopk. Ch.* 557; *Montgomery v. Ibid.*, 3 *Barb. Ch.* 132.)

There is no necessity for the issuing and return of a commission of lunacy in order to avoid a marriage on proof of lunacy. (*Edwards on Referees*, p. 549; *Hoffman on Referees*, p. 170.) Because with or without the return, the court will demand proof satisfactory to itself of the fact of lunacy (*Turner v. Meyer*, 1 *Hagg. Cons.* 416.)

But insanity, being always considered at law as a disease, does not, when occurring after marriage, afford any ground for divorce. Whatever its degree it is viewed only as a misfortune and not as a breach of the contract. This was also the doctrine of the civil law. *Furor quin sponsalibus impedimento sit plus quam manifestum est sed postea interveniens sponsalia non infirmat.* (*Dig. lib.* 23, *tit.* 1, *art.* 1. § 3.)

Parol agreements.

So far as parol agreements are concerned which may have been made previous to the insanity of a party, and remain executory after that event, the question of their binding character is to be determined by the consideration upon which they rest. The current of authorities is against supporting moral considerations alone, as sufficient to sustain, such an agreement, unless some element of duty forms a foundation for the promise. "There are," says Judge STORY in his treatise on Bailments (p. 183), "many rights and du-

ties of moral obligation which the common law does not even attempt to enforce. It deems them of imperfect obligation and therefore leaves them to the conscience of the individual." And courts of law in consequence decide according to the legal obligations of parties. (*Turner v. Mason*, 14 *M. & W.* 117.) And in the *Matter of Willoughby* (11 *Paige*, 257), the court refused to sustain the ante-nuptial agreement of a lunatic to support his step-daughter, such agreement being made by parol, because it appeared probable that the party, if sane, would not have supported her under the circumstances of his estate. But otherwise *mutatis mutandis*. And on this latter principle it was held that the court might, if the estate were sufficient, make an allowance for his needy relatives, and would for his children and heirs. But in the case of adult children, capable of supporting themselves, they must take subject to a hotch-pot distribution of his estate after his death.

PROMISSORY NOTES.

An insane person who delivers a note upon an agreement made by him, while insane, may recover back the amount, after it has been collected from the other parties. (*Rice v. Peet*, 15 *Johns.* 503.) And where, upon an action on a promissory note purchased before maturity, in good faith and for value, it was shown on the trial that an inquisition had, after the making of the note and the commencement of the action, declared the defendant to be of unsound mind at the date of the making of the note, *held*, that the inquisition established *prima facie* the insanity of the defendant at the time the note was made, and that in order to recover the plaintiff must show either that he was sane at that time, or that he had received such a consideration for the note that justice and equity required it to be paid out of his estate. (*Hicks v. Marshall*, 8 *Hun*, 327.) In New Hampshire it has been held that an insane person cannot indorse a promissory note. (*Burke v. Allen*, 29 *N. H.* 106.) And in Massachusetts, in an action by the indorsee of a promissory note

against the maker, it is no defense to prove that the plaintiff procured the indorsement by undue influence from the payee when he was of unsound mind and incapable of making a valid indorsement, if the payee or his legal representatives have never disaffirmed it. (*Carrier v. Sears*, 4 *Allen*, 336.) In like manner it has been held, that evidence that the payee of a negotiable instrument payable to order was insane all the time from the issuing of the paper until his death was admissible to disprove the validity of any transfer of such paper. (*Hannahs v. Sheldon*, 20 *Mich.* 278.)

2d. *A lunatic may contract for necessities suited to his condition.*

The same rule which permits an infant to bind himself for necessities applies to a lunatic. And ever since the case of *Manby v. Scott* (1 *Sid.* 112, A.D. 1659), it has been held that the executed contract of a *non compos* for necessities *bona fide* supplied to him might be enforced. In such case the term "necessaries" is not restricted to articles of prime necessity, but includes every thing suitable to the parties' station and condition in life. (*Lane v. Kirkwall*, 8 *C. & P.* 679; *Portsmouth v. Portsmouth*, 2 *Car. & P.* 178; *Molton v. Camroux*, 4 *Exch.* 17; *Nelson v. Duncomb*, 7 *Beav.* 211; *Dart on Vendors*, 3 *Chitty on Cont.* 197; *La Rue v. Gilkyson*, 4 *Barr.* 375.) Nor is it necessary to prove a specific agreement, because the law raises a contract by implication on the part of the lunatic, under which the amount of such necessities may become payable as a debt out of his real or personal assets on a bill filed for the administration of such assets. (*Wentworth v. Tubb*, 1 *Y. & Coll. [N. S.]* 171; 6 *Jur.* 980; *Barnes v. Hathaway*, 66 *Barb.* 452; *Skidmore v. Romaine*, 2 *Bradf.* 122.)

Though the necessities be for the use of the lunatic's family, their price may still be recovered when ordered by him. Thus in *Shafer et al. v. Estate of Wing* (2 *Hun.* 671), it appeared that George F. Wing was declared a lunatic and

a committee of his estate appointed, after which he continued to reside with his family in Brooklyn. The petitioners, after the appointment of such committee and in ignorance thereof, sold the lunatic groceries for himself and family, such being necessary for him and used in his family. *Held*, that the bill of the petitioners should be paid out of his estate. And in like manner it has been held that a lunatic is bound for medical or surgical services rendered to his wife. (*Pearl v. McDowell*, 3 *J. J. Marsh.* 658; *Fitzgerald v. Reed*, 9 *Sm. & Marsh.* 94.)

It is thus seen that executory contracts for necessities constitute an exception to the general law and are the only ones which courts will enforce against a lunatic. For where a lunatic has received the benefit of property sold to him in good faith by a party who had no knowledge of his incapacity to contract, and where no advantage has been taken of his situation, a court of equity will not interfere to set aside the contract. (*Loomis & Hayden v. Spencer & Rolph*, 2 *Paige*, 153.)

Defeasance of contracts made by one non compos.

Whatever may have been the rule at common law, as cited by Coke in *Beverly's Case* (4 *Rep.* 124), that a man might not avoid his deed or contract by pleading his insanity (2 *Blacks. Comm.* 291), this barbarous doctrine, calculated to shield, as well as to encourage fraud, has long since been exploded. (*Yates v. Boen.* 2 *Str.* 1104; *Thompson v. Leach*, 2 *Ventr.* 198; *Webster v. Woodford*, 3 *Day*, 90; 2 *Kent*, 594.)

And it may now, after frequent affirmations, be considered as among the best settled principles both in law and in equity, that a person *non compos* may plead his disability in avoidance of his contracts, or show it in evidence under the general issue. If he pleads by attorney, and upon examination it appears that his incapacity continues, the plea may be treated as a nullity and a guardian *ad litem*,

appointed, who may plead *de novo*. (*Mitchell v. Kingman*, 5 *Pick.* 431; *Rice v. Peet*, 15 *Johns.* 503; *Seaver v. Phelps*, 11 *Pick.* 304; *Lang v. Whidden*, 2 *N. H.* 435; *Thornton v. Appleton*, 29 *Me.* 298; *Grant v. Thompson*, 4 *Conn.* 204; *Gore v. Gibson*, 13 *M. & W.* 623; *Molton v. Camroux*, 2 *Exch.* 501; *Burke v. Allen*, 29 *N. H.* 114.)

All such contracts may be avoided therefore, either by the insane parties, or by their legal representatives, as in the case of infants. (*Carrier v. Sears*, 4 *Allen*, 336; *Jackson v. Gumaer*, 2 *Cow.* 560; *Somers v. Humphrey*, 24 *Ind.* 238; *Key v. Davis*, 1 *Md.* 32; *Allen v. Berryhill*, 27 *Iowa*, 534.)

But the wife of an insane person cannot bring suit to avoid the contract of her husband merely as his wife. She does not become his legal representative by the fact of his lunacy, and his committee is the only proper person to represent his interests at law. (*Kibbee v. Myrick*, 12 *Fla.* 419.)

In England the defense of lunacy will not avail unless it be shown that the plaintiff imposed upon the defendant (*Brown v. Joddrell*, 1 *Moo. & M.* 105); nor is it sufficient that the party was of unsound mind. The jury must be satisfied that the plaintiff knew it and took advantage of it. (*Dana v. Kirkwall*, 8 *C. & P.* 679.) And this doctrine was fully affirmed in *Molton v. Camroux* (2 *Exch.* 487; 4 *Ib.* 17); and *Bagster v. Portsmouth* (5 *B. & C.* 170).

From a review of which authorities it would seem to be a principle then generally recognized that a contract of sale and purchase by a person apparently sane, though subsequently proved to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding where no fraud or imposition has been practiced. (*Elliott v. Ince*, 7 *De G. M. & G.* 475.)

Therefore, no executed contract can be rescinded until both parties can be restored to the condition in which they

were before the contract was made. If possible the equities must be made as nearly equal as circumstances will permit, and if the estate of the lunatic has been benefited by the transaction there must be corresponding restoration. (*Loomis v. Spencer*, 2 *Paige*, 153; *Young v. Stevens*, 48 *N. H.* 133; *Beals v. See*, 10 *Penn.* 56; *Behren v. Mackenzie*, 23 *Iowa*, 343.)

A court of equity, when its jurisdiction is invoked to set aside deeds and contracts of a person on the ground of insanity, acts upon equitable principles. But it is by no means a matter of course for such a court to set aside and declare void the act of a lunatic executed during his lunacy. It does so in nowise except upon the universal maxim of that court that he who seeks equity must do equity. (*Canfield v. Fairbanks*, 63 *Barb.* 461; 1 *Story's Eq. Jur.*, § 228; *Shelford on Lunacy*, 419.)

Still, where a party not absolutely *non compos* seeks to be released from the performance of a contract, his weakness of mind will be taken into consideration by a court of equity as one circumstance in determining whether the contract should be carried out. (*Baller v. Jones*, 22 *Ark.* 92.)

TORTS COMMITTED BY LUNATICS.

3rd. Legal liabilities may be enforced against idiots and lunatics, whether the mental incompetency be judicially established or not.

A lunatic cannot be punished for crime, but he may be sued for an injury done to another. He is not a free agent, capable of intelligent, voluntary action, and, therefore, is incapable of a guilty intent, which is the very essence of crime. But a civil action to recover damages for an injury may be maintained against him, because the intent with which the action is done is not material. The principle upon which this distinction rests reaches also to the measure of damages in a civil action. Ordinarily in an action for a personal injury, the damages are graduated by the intent of

the party committing the injury. But where the defendant is a lunatic, as he has properly no will, the only correct measure of damages is the mere compensation of the party injured. (*Krom v. Schoonmaker*, 3 *Barb.* 647. *Bush v. Pettibone*, 4 *N. Y.* 300; *Cross v. Kent*, 32 *Md.* 581; *Behrens v. Mackenzie*, 23 *Iowa*, 343; *Bacon's Abr.* "Idiots & Lun." "Trespass," and *ca. ci.*; *Weaver v. Ward*, *Hob.* 134; *Cross v. Andrews*, *Cro. Eliz.* 622; *Broom's Com. C. L. p.* 684.)

Thus, where an idiot, who was under the care of a committee, pulled down a school-house standing upon lands owned in common by him and the trustees of the school district, the court authorized an equitable partition of the land, so as to compensate the trustees for the share of the school-house which belonged to them. (*Matter of Heller*, 3 *Paige*, 199.) In all such cases only compensatory and not vindictive damages will be allowed, and the actual injury sustained will be the measure of them. (*Krom v. Schoonmaker*, 3 *Barb.* 647.) And a right of action in tort having once accrued is not barred by a finding in lunacy, in consequence of which legal liabilities may always be enforced against lunatics and idiots, whether the mental incompetency has been judicially determined or not. (*Sanford v. Ibid.*, 62 *N. Y.* 553.) Nor will the idiocy of a debtor take a claim out of the operation of the statute of limitations, during his life-time, but the statute begins to run against the claim the same as if he were of sound mind. (*Ibid.*)

But negligence cannot be imputed to a lunatic either through his acts or his omissions, for in either case he is not deemed a juridical cause but an irresponsible instrument. (*Whart. on Negl.*, §§ 87, 88, and *ca. ci.*) And in a case of slander or libel, where malice is an essential ingredient, insanity is admissible in disproof as will be shown below.

SLANDER AND LIBEL BY LUNATICS.

It is a well-established principle that a lunatic is liable for a trespass or tort because the matter of discretion or free

moral agency is not inquirable into in a civil action. (*Weaver v. Wood*, *Hob.* 134; *Bullock v. Babcock*, 3 *Wend.* 391.) Yet in respect to torts to the reputation, as by oral or written slander, some special considerations are due to the state of mind of the party which may justly be offered in mitigation of damages. One of the earliest symptoms of an unbalanced mind is often found in an unjust suspicion of others, which, by repeated meditation, provokes an emotional excitement in its subject, disabling him from speaking either calmly or justly of the one thus suspected. The thought of this person at once revolutionizes the judgment; the ideas habitually entertained concerning him crowd tumultuously forward, and as any violent thinking when accompanied by emotional fervor tends to break out into speech or even writing, a party may in such a condition utter defamatory words without any ulterior purpose than that of relieving the tension of his own thought. Tears, profanity and oral vituperation are in certain conditions of mind a natural outlet for discharging pent-up emotions. Such mental convulsions cannot always be prevented in sane minds, and much less so in unbalanced ones, however slightly their disorder may reveal itself in rational acts excluding emotional reminiscences. Therefore, total derangement of mind need not be proved in order to justify mitigation of damages; and even partial unsoundness on the subject to which the words relate may be given under the general issue.

In *Horner v. Marshall* (5 *Munf.* 166), an injunction was granted to stay proceedings under a judgment obtained against the complainant in the bill (who was defendant at law), it appearing that on the subject to which the defamatory words related the defendant was insane, though his mind was sound in other respects.

In *Bryant v. Jackson* (6 *Humph.* 199), it was held that insanity is a good defense to an action of slander, and that the testimony of witnesses that the defendant was a weak.

mind man, and at times both before and after the uttering of the slanderous words totally deranged, is competent evidence to be considered by the jury in determining whether the defendant was in fact insane at the time of speaking the words. And where a defendant charged a plaintiff with the commission of an offense, but at the same time qualified his statement by saying that he (the plaintiff) got a new trial on the ground of insanity, it was held that, although otherwise actionable, yet, as insanity would be an excuse for the offense, the words were not actionable. (*Abrams v. Smith*, 8 *Blackf.* 95.)

From the foregoing authorities it will be seen that in an action either for slander or libel insanity is a good defense in mitigation of damages. But what degree is to be received as an excuse cannot be definitely stated. Nor perhaps is it necessary to be ascertained, since responsibility will always depend upon the actual injury to character produced. Hence when the mental derangement is so great and notorious that speaking defamatory words can produce no effect upon the hearers, no damage is suffered. When the insanity is slight in character and only periodically exhibited, there being lucid intervals meanwhile, so that no uniformity in the mental status is present, slander may produce its ordinary effect. It must then devolve upon the jury to judge of the mental condition of the defendant when the tort was committed and of its effect upon others, in measuring the damages. (*Dickinson v. Barber*, 9 *Mass.* 227.) The defendant, however, may, under the general issue, show that he was insane when he uttered the words, but in so doing he must establish it by proof. (*Yeates v. Reed*, 4 *Blackf.* 463.)

And if, after an action of libel begun, a defendant is found insane by inquisition and the finding overreaches the time of the libel or slander, such finding would be a good defense in mitigation of damages. But if the inquisition does not overreach the time of the libel, then the subsequent insan-

ity of the party can have no bearing upon the question of the measure of damages, for a lunatic is civilly responsible for his torts whenever they may have been committed. Thus an action brought against a party for either slander or libel, although a personal action, does not abate by his subsequent insanity. It may, indeed, be suspended until an order is made allowing the committee to be substituted for the lunatic, but it does not *ipso facto* abate, because insanity has never yet been declared by statute in this State to be civil death, and although when once judicially established it is presumed to continue, still that presumption may be rebutted since the possibility of recovery is always admitted. Were the principle otherwise, so that insanity constituted civil death, then, after office found, the wife of a lunatic might marry again without committing bigamy, and his estate might be distributed among his heirs or representatives. It is unnecessary to say that neither of these results have ever been held to flow out of the status of insanity. (*Townshend on Slander*, 2nd ed., 434, § 248; *Gates v. Meredith*, 7 Ind. 440.)

LEGAL EFFECTS OF ADULTERY BY AN INSANE HUSBAND OR WIFE.

Marriage when valid constituting a status, as well as a civil contract at common law, the question of whether adultery committed by an insane party is or not a legal cause for divorce has been discussed in several cases in this country, but unfortunately with great contrariety of opinion. The subject is somewhat novel even in so old a jurisprudence as that of England, there being but two reported cases, the first of which was virtually not decided at all, the court accepting for its guidance a suggestion from an unreported case. In our younger jurisprudence we already have five cases reported, in three of which the court stayed the proceedings. Of the remaining two the court in the one instance granted dissolution, in the other remarked that it might, if the proceedings were continued and the evidence established the charge contained in the libel.

In our earliest case, that of *Broadstreet v. Broadstreet* (7 Mass. 473, A. D. 1811), the libel charged adultery in the wife on a day certain, and prayed a divorce from the bonds of matrimony. But it appearing that the wife was insane at the time and had ever since continued so, the libel was dismissed. In *Mansfield v. Mansfield* (13 Mass. 412, A. D. 1816), a libel was filed by the wife for a divorce, upon the ground of adultery. The husband not appearing, his default was entered, but it being suggested to the court that the husband, since the fact alleged, had become insane, the default was discharged in order that a guardian might be appointed for him, the court remarking that further proceedings might then be had and if sufficient cause appeared a divorce might be decreed. In *Matchin v. Matchin* (6 Barr. 332), GIBSON, C. J., after an elaborate discussion of the superior ill effects of the wife's adultery upon society, over those of the husband, took the broad ground that the wife's insanity would not be a defense to a libel for adultery, for the reason that its effects might be to impose a spurious offspring upon the husband, and that consequently the husband was entitled to a divorce. At the same time he held that such insanity would be a valid defense to an indictment for the adultery. The first part of his judgment is thus made to rest on grounds of public policy alone; the second on that natural equity everywhere applied to the acts of the insane, when criminally adjudicated.

In *Nichols v. Nichols* (31 Vt. 328), which arose upon a libel for divorce because of adultery committed by a wife whose insanity at the time was admitted, and a guardian *ad litem* appointed to answer for her, Chief Justice REDFIELD took occasion to comment in most severe terms upon the principle laid down in *Matchin v. Matchin*, remarking that he was surprised that such an opinion should ever have found admission into the reports, and should be shocked at the prospect that it could ever gain general countenance in the American Republic. Accordingly he held that "gene-

ral insanity is a full defense for all acts which by the statute are grounds of granting divorce. In regard to severity and desertion, there could be no question. There is wanting the consenting will, which is indispensable to give the acts the quality, either of severity or desertion. The case is the same in regard to acts of sexual intercourse with one not the husband. If done by force or fraud, no one could pretend that it formed any ground of dissolving the bonds of matrimony. And insanity is even more an excuse than either force or fraud. It not only is not the act of a responsible agent, but in some sense it might be fairly regarded as superinduced by the consent or connivance of the husband, since he has the right, and is bound in duty to restrain the wife when bereft of reason and the power of self-control, from the commission of all unlawful acts, both to herself and others."

This is undoubtedly sound reasoning, assuming the husband to have known of the wife's insanity, and to have neglected to exercise a diligent supervision over her conduct. But suppose him absent by business engagements for long periods of time from home, as in the case of a naval officer or commercial traveller, and his wife unbeknown to him becoming insane and committing adultery, could negligence or connivance be imputed to him? Marriage does not produce omniscience. How then can a man be held culpable for not foreknowing and preventing an act of sexual intercourse committed by his wife when at a distance from him, without his connivance in that act being first proved? It is easy to speak of the husband's duty in such a case, but circumstances may show that he was powerless to exercise his authority, and if so, then he should be absolved from responsibility, since *impossibilia nulla fit obligatio*.

It will be perceived that the court in the above case as in *Broadstreet v. Broadstreet*, before cited, appears to apply the analogy of crime to the charge of adultery alleged against an insane wife, and draws thence the natural inference that since she is *non compos* and cannot in law

commit a crime, she cannot by parity of reason commit legal adultery. And much the same view is taken in *Wray v. Wray* (19 *Ala.* 522), where it was again held that adultery committed by an insane wife is no ground for a divorce. But is it necessary to assume that a lunatic cannot commit a tort because he cannot commit a crime, when, as is well settled, the ingredient of will or intention is not indispensable to the establishment of a tort, and consequently need not be proved? Thus an infant of tender years is responsible in damages for torts to property or the person. (*Bullock v. Babcock*, 3 *Wend.* 391.) So is a lunatic, for in either case the *quo animo* is immaterial. If, therefore, we divest ourselves of all idea of crime as associated with adultery, when committed by a lunatic, and treat the question as a tort in general, whether committed by a sane or insane person, we shall be forced to the conclusion that upon principle and in analogy to the practice of courts of law and equity, there is no reason why a lunatic should not be a respondent in a suit for divorce. Marriage is a civil contract, and adultery a breach of it, and at law a lunatic is liable on a contract or for a tort. In *Parnell v. Parnell* (2 *Hagg. Cons. R.* 170), a lunatic husband was permitted to file a libel against his wife for adultery. Suppose there had been recrimination on her part, could she have been estopped from prosecuting her libel against him on account of his insanity?"

In *Bawden v. Bawden* (2 *Sw. & Tr.* 417), the court refused to allow a husband to proceed with a petition against his wife, who was a lunatic, for the dissolution of their marriage on the ground of adultery alleged to have been committed by her previous to her lunacy. In this, the first reported case of its kind in England, the court could find no precedent by which to guide itself, but an unreported decision in the court of Arches to the effect that a suit for divorce *a mensa et thoro* could not be maintained against a lunatic. In *Mordaunt v. Mordaunt*, (39 *L.J. Prob. & Mat.* 57), which arose in 1870, and is the second reported English

case, the Judge Ordinary made an order upon the petition and evidence of the respondent's insanity, staying further proceedings until she should recover. Upon appeal to the full court, there was a division of opinion upon the question, the Judge Ordinary and one judge holding that the insanity of the respondent so long as it should continue, would be a bar to the suit, and therefore that the order ought to be affirmed, while the chief Baron, dissenting, held that the court had power only to stay the proceedings so long as there might be a reasonable probability that the respondent would recover. But that, when her recovery became hopeless, the petitioner ought to be allowed to proceed, and therefore the order ought to be rescinded. (*Ib.*, 2 *Sc. & Div. H. L.* 374.)

Despite the irreconcilable conflict of opinions represented by the foregoing authorities, one fact remains patent and uncontradicted, and that is that in all the above cases a breach of the civil contract of marriage was admitted to have taken place; the legal effect of which was made to rest upon the decision of the question whether the status of the person whose misconduct or misfortune had caused injury to another, could be a complete defense in a suit for a dissolution of the contract. (*Rathbun v. Rathbun*, 40 *How. Pr.* 328.)

Now, it is a well-settled principle that, whenever any tort is committed and damage has ensued thereby, the question of discretion or intention cannot be raised in defense of the action, but only in mitigation of damages, for *ubi jus ibi remedium*. And it seems but just that the person whose misconduct or misfortune has caused an injury to another should bear the loss, or make reparation. The fact that the injured party is the husband of the wrong-doer does not, as we know, destroy his right of action in the case of adultery committed by a sane wife. Upon what principle should it then, in the case of an insane wife? Is it because she cannot make answer while in that state to the libel filed against her? If so, then a stay of proceedings might be granted, but the suit itself would not thereby abate. The wrong

done the husband is as great in one case as in the other, for the insanity of the wife cannot in any sense destroy the effects of her adultery. The breach of contract is complete without regard to the *quo animo*. Nothing on her part can efface it.

Again, it should be remembered that, beside the wrongfulness of the act *per se*, she may in addition bear him a spurious progeny to share with his lawful heirs in his estate. Adultery is thus seen to be both *damnum et injuria* a legal wrong coupled with a damage. It is a breach of the contract and therefore a tort done to the husband and to his progeny. It would seem, therefore, that equity could hardly refuse some remedy to a husband thus wronged; nor can that remedy justly be any thing less than full protection to himself against the risks of a spurious progeny, to be imposed upon him by the legitimization which a continuance of the marriage state would impart to any such offspring. It is plain that the equities in such a case are mostly on his side, and when, consequently, without fraud, or connivance on his part with a third person to debauch his insane wife for the express purpose of creating a case of divorce against her, she of her own disposition invites or consents to improper advances terminating in adultery, it would be against public policy, and a great wrong to the family to deny him and them the protection against spurious offspring which alone could be secured by a separation.

If marriage, however, were purely a civil contract then its breach by either party would justify a dissolution. But it is recognized in all Christian countries as something more than a contract, and by the *jus gentium* it is also constituted a special status. Hence it is doubtful whether any court could, by mere implication of power, and in the absence of special legislative permission, decree any higher remedy for adultery committed by an insane wife, than a judicial separation *a mensa et thoro*. A dissolution of a marriage once valid is a judicial act which must rest upon the authority

granted by the law-making power. It can be applied only to those who intentionally and therefore criminally violate the marriage contract. For a divorce *a vinculo*, although a civil act, carries with it a criminal effect, since it is in the nature of a personal penalty affixed to a personal wrong. But since a lunatic has no legal capacity to commit an act involving personal punishment, he can do nothing which carries with it a criminal effect. And inasmuch also as insanity is not a ground for divorce at common law, any more than any other disease, so wrongful acts committed by one afflicted with it are equally impotent as causes justifying a dissolution of the marriage contract.

In cases, however, where a libel for divorce is filed against a lunatic wife on the ground of adultery, a stay of proceedings should be granted as was done in *Mordaunt v. Mordaunt*, in order to give the respondent sufficient time for recovery, and thus to make a defense to the charge. From the very nature of the offense, the respondent must be the one most able to meet such a charge, and thus to instruct counsel in her defense. And it is only when her disease has proved itself incurable from lapse of time, that a decree should be entered for a limited divorce, since that does not disturb the status absolutely, but only suspends its operation, meanwhile securing maintenance for the wife, protection to the husband, and in case of recovery, giving opportunity for reconciliation, if the parties themselves should see fit to apply for a revocation of the decree under the statute.

ADULTERY AND RAPE IN THEIR RELATIONS TO INSANITY.

That the adult human being is constantly subjected to the appetite for self-preservation and procreation are facts universally recognized. They are among the imperative instincts of our nature and must not, therefore, be criticised under standards of conduct applicable to purely intellectual acts. While reason may repress outward demonstrations

of salacity, it does not necessarily extinguish thereby the sexual œstrum underlying it. Being the expression of a general law operating throughout all animal organisms, every human being occasionally experiences the organic appetite now under discussion. In the insane, with the weakening of the intellectual powers there frequently goes an increase of the animal propensities, which then may attain to the most exceptional and degrading proportions. But whether in the sane, who can control themselves by an effort of the will, or in the insane, who cannot, the sexual appetite in either class is in the nature of a febrile delirium, which may easily pass into an uncontrollable impulse.

In many cases, therefore, it must be conceded that an insane person may become a demandant for sexual gratification, not because he or she are insane, but because they are human beings under duress to a common appetite, and have at the same time lost their powers of self-control. The appetite may or may not be increased by the insanity, but the power of controlling or regulating it unquestionably is. Under such circumstances adultery might be committed with full knowledge of the act and of its consequences by an insane person, and it could not be said to be the act of a mind incapable of assenting, or of a mind deprived of the power of willing, since it might exhibit both in the act committed. It would follow from this that where any woman is not a judicially declared lunatic, or in the custody of an asylum, or where there are no conspicuous proofs or even indications of insanity, and the other party is ignorant of the mental condition, an act of sexual intercourse, committed with an insane woman without force or fraud, is not legally a rape. Hence, where a man had carnal connection with a woman of mature age, good size and strength, but who was shown by the testimony to be in a state of dementia, not idiotic but approaching to it, and it appeared that there was neither force nor fraud used by him, it was held by the Supreme Court of Michigan that this did not constitute a rape. (*Crosswell v. People*, 13 Mich. 427.)

The word "will," as there remarked by Judge COOLEY, "when employed in defining the crime of rape, is not construed as implying the faculty of mind by which an intelligent choice is made between objects, but rather as synonymous with inclination or desire, and in that sense it is used with propriety in reference to persons of unsound mind ; and similarly, in *State v. Crow* (*Western L. J.*, vol. 10, pp. 501-5), the court observed, that "both idiots and insane persons were to be considered as possessed of a will, so that it might be legally and metaphysically said that a carnal knowledge might be had of their person forcibly, and against their will. And if so, then they might by non-resistance, and where neither force nor fraud was employed against them, give a voluntary assent to an act of sexual congress, and thus deprive it of the character of a rape. In other words, they might desire the act and help to consummate it. It might be said then that to constitute rape, not only should the incapacity to assent be shown, but there must be some evidence also to disprove assent." This would seem to be the English rule as laid down in *Reg. v. Fletcher* (*Bell's Cr. Ca.* 63), which is in full accord with the judgment in *Crosswell v. People*, before cited. These decisions would tend to establish the principle that a lunatic may consent to an act of sexual congress where neither fraud nor force are employed.

ALLEGED TORTS TO LUNATICS IN ASYLUMS.

The protection given to personal liberty at common law, and the security afforded against not only restraints upon it, but also against assaults, however slight, affords a very striking proof of the jealousy with which the law regards the sacredness of the human person. There is a self-evident reason for this, and a full justification in the peace and good order of society which require to be guarded by such principles of personal inviolability. Nevertheless an act of ag-

gression will justify self-defense *quoad hoc*, and wherever, therefore, any alleged trespass to the person has been committed *se defendendo*, the party should be able to show that the force used did not exceed the necessity of the case, so as to convert him in turn into an assailant. Hence *molliter manum imposuit*, or *son assault de même*, are good pleas in justification, when supported by the evidence, because even violence may be justified, if proportioned to the circumstances giving occasion for it.

In the relations existing between lunatics and their keepers, occasions often arise when all moral agencies failing, physical coercion must be employed. Two principles may here be invoked in support of such conduct; first, that of *salus populi suprema lex*, under which any one may justify an assault committed in restraining the fury of a lunatic (*Brookshaw v. Hopkins*, *Lofft*. 243); and second, that which imposes the duty upon all guardians of infants and lunatics to protect them against the evil consequences of their own acts by any and all means necessary to secure that end. Thus at common law the custodian of a lunatic might bind and beat him, without committing an assault. (*Hawk. P. C.*, B. 1, Ch. 90; *Roscoe's Cr. Ev.* 398.) Inasmuch, also, as there are many varieties of circumstance under which coercion may lawfully be exercised toward lunatics, we shall be justified in treating them in detail and according to the degree of their importance.

Lunatics under a delusion may refuse to eat, to bathe, to take medicine or exercise, to rise from their beds, in a word to comply with medical prescriptions. They cannot legally be permitted to starve, or to die from filth or want of fresh air, or exercise, even though they desire it. Consequently they must be fed, washed, medicated, made to exercise and to go out in the air, forcibly and against their will, for it is the duty of their custodians to compel this *in favorem vitæ*. Not to do it would be to aid them in committing suicide. A struggle ensues and they are injured through their own

violent actions. In such cases the question of responsibility must be decided by the same principles which govern courts in actions for alleged malpractice by surgeons. Thus if a surgeon were performing a delicate operation upon either an adult or a child, and by a sudden motion, whether intentional or not on the part of the patient, the latter caused the surgeon's hand to slip and a wounding ensued, no blame could be attached to the operator. Where no lack of skill or diligence could be shown, the insanity of the patient would not affect the merits of the case in the least degree. The law will not cast the burthen of responsibility, for every accident which may happen, upon the surgeon, because the equities of the case require that the patient should submit himself to the guidance of the physician. Sane or insane, the patient has no right to add the obstacle of his resistance to the embarrassments of his disease, and to profit by his wrong or his misfortune to the injury of an innocent party.

It is common to say, as though it were a principle never to be qualified, that contributory negligence is not imputable to lunatics any more than to infants. But this is as erroneous as to say generally that all lunatics are violent and dangerous, or that no infant can commit a crime. Experience at once refutes the former of these assumptions, and the history of criminal jurisprudence the latter. It is well settled that an idiot, or a lunatic of whatever grade of incapacity, is equally liable in damages for a tort. (*Krom v. Schoonmaker*, 3 Barb. 647 ; *Cross v. Kent*, 32 Md. 581.)

The law gives a *non compos*, very justly, no immunity from damages for wrongful acts committed by him, because in such cases the fact alone of the tort, and not the *quo animo*, is the subject-matter of the issue. His insanity or his idiocy is no defense, therefore, to an action for damages. His only exemption is from punishment.

If, then, he cannot be allowed to plead his insanity in bar of damages for wrongs done to property, upon what principle, when the law has put him in the custody of its own

medical officers, can he be allowed to injure himself and charge the damages to his custodians? It is doubtless his misfortune to be insane, but that fact does not *per se* extinguish the right of his custodians to be protected against the consequences of his own acts. So long as these custodians act within the limits of their authority, and are not guilty of negligence or criminal violence, they are ministers of the law engaged in the performance of their duty. Therefore no presumptions of felonious intent will arise merely from the employment of violence to restrain violence. The lunatic or the infant are none the less human beings because of their mental incompetency. And although the idea of duty cannot well be applied to them as the foundation of an obligation, still it is an idea which cannot wholly be winked out of sight in the relation of physician and patient.

The physician does not deal with inanimate matter in treating human bodies, but with sentient active beings governed largely by their own wills or feelings. Over these he can never exercise an entire control, nor, if they combine to oppose him, can he exercise any. When, therefore, he is compelled, *virtute officii*, to administer to the wants of such a being, the contributory and tortious acts of that being, resulting in injuries to its own person, should exonerate him from all responsibility, whenever they do not spring from any unlawful acts on the part of the physician himself.

The principle is well settled, that the services rendered by a physician are not purely subjective and personal, but that they impose upon the patient, from the peculiar circumstances of the contract, the duty of co-operating with his medical adviser in the common purpose of a cure. If the patient cannot or will not, then this fact diminishes *pro tanto* the responsibility of the physician. For the contract at the outset implies submission, *facio ut facias*, and he, who cannot execute his part of it, cannot throw the blame for any wrong upon the other, who has been faithful in executing his. Thus, in a leading case, that of *Mc-*

Candless v. McWha (22 Penn. St. 268), which was an action for malpractice, the court, speaking of the duty of patients toward their medical advisers, said: "It is the duty of the patient to co-operate with his professional adviser, and to conform to the necessary prescriptions; but if he will not, or under the circumstances cannot, his neglect is his own wrong or misfortune, for which he has no right to hold his surgeon responsible. No man may take advantage of his own wrong or charge his misfortune to the account of another."

And as a corollary to this, the law always approving of acts done *in favorem vitæ*, will not impute negligence to an effort made to preserve it by a physician or other person acting in the line of his duty, unless such effort be accompanied by circumstances constituting rashness in the judgment of prudent persons. (*Eckert v. Long Island R. R. Co.*, 43 N. Y. 502.)

The combined irritation from disease, and indignation arising from forcible detention in asylums, so often manifested by lunatics, begets in them at times a personal hatred of physicians and attendants, which finds vent in kicks, blows, and dangerous assaults. While, therefore, the treatment of the insane is jealously supervised by the law, because of their infirmity, it must at the same time be remembered that such persons are governed in their actions by the ordinary motives of love, fear, envy, hatred, malice and revenge, which operate on the human mind. For, as was truly remarked by BIGELOW, C. J., in *Dean v. Mut. L. Ins. Co.* (4 Allen, 96): "A person may be insane, entirely incapable of distinguishing between right and wrong, and without any just sense of moral responsibility, and yet retain sufficient powers of mind and reason to act with premeditation, to understand and contemplate the nature and consequences of his own conduct, and to intend the result which his acts are calculated to produce."

LIFE INSURANCE AS AFFECTED BY SUICIDE.

At common law no presumption of insanity arises merely from the act of suicide. (*King v. Saloway*, 3 *Mod.* 100; 1 *Hawk. P. C.* 164; *Burrows v. Burrows*, 1 *Hagg. Ecc. R.* 108; *Terry v. Life Ins. Co.*, 2 *Bigelow*, 31.) Being regarded as a felonious act, it requires for its commission a responsible, and therefore a rational being. Hence a somewhat nice, though perfectly defensible distinction has arisen in law between the terms "suicide," and "dying by one's own hands," and although a lunatic may voluntarily die by his own hand, he cannot, properly speaking, commit *felo de se*.

Presumptions of insanity should therefore never precede proofs, particularly when that presumption is made to rest upon a single act like that of suicide. Such an act may be as felonious as homicide committed upon another, and the fact that the love of life is inherent in all expresses nothing more than a subjective condition, constantly varying in degree, from the most abject fear of death to the most intolerable *taedium vitæ*. Men have in all ages shown a disrelish for life far overbearing their supposed love for its duration, and in consequence have committed suicide with the most perfect deliberation, and in the apparent enjoyment of an unclouded reason. To say of such that they were insane is to say what we cannot prove. Nor, in respect to any other act committed by a human being, would a court accept the single disconnected transaction, as an evidential fact of overpowering probative force. Experts in insanity know that something more than the act of suicide is necessary to establish proper proof of its existence, in one dying by his own hand. (*Winslow's Anatomy of Suicide*.)

The proviso inserted in policies of life insurance, whereby the insured forfeits his claim if he commits *felo de se*, can properly as a contract be binding only upon one having possession and control of his reason. To no other state of mind than this can it legally apply.

But the most important question in this connection is,

whether a person, alleged to have been insane when dying by his own hand, committed intentional self-destruction. This is the only proper *felo de se*. And it has been repeatedly held by the highest courts of this country and England that intentional suicide, thus constituting felonious self-destruction, may be committed by a person who is insane. (*Borrodaile v. Hunter*, 5 *Man. & Gr.* 639; *Clift v. Schwabe*, 3 *C. B.* 437; *Dufaur v. Profess'l Ins. Co.*, 25 *Beav.* 602; *Dean v. Am. M. L. Ins. Co.*, 4 *Allen*, 96; *Easterbrook v. Union M. L. Ins. Co.*, 54 *Me.* 224; *Nimick v. Mut. Ben. L. Ins. Co.*, 3 *Brewst.* 502; *St. Louis Mut. Ins. Co v. Graves*, 6 *Bush*, 298; *Cooper v. Mass. Mut. Ins. Co.*, 102 *Mass.* 227.)

Said Mr. Justice MILLER, of the Supreme Court of the United States, in a recent case: "It is not every kind or degree of insanity which will so far excuse the party taking his life as to make the company insuring liable." (*Terry v. Mut. L. Ins. Co.*, 1 *Dill. Circ. Co.* 403.)

In a recent case in New York, the Court of Appeals reviewing the existing conflict of decisions upon the question of intention as a pre-requisite to a felonious self-destruction, said that "in the practical administration of justice in cases of this description, it seems to us a dangerous doctrine to hold that the attention of the jury should be directed principally to the degree of appreciation which the deceased had of the moral nature of his act, and that this question, most speculative and difficult of solution, should be made the test by which it should be determined whether he had knowingly and voluntarily violated the condition of his insurance. The real question is, whether he did the act consciously and voluntarily, or whether from disease his mind had ceased to control his actions.

Supposing a man to be in possession of his will and of the ordinary mental faculties necessary for self-preservation, but that his mind has become so morbidly diseased on the subject of suicide that he cannot appreciate its moral wrong, and in this condition of mind he takes his own life volun-

tarily and intentionally, perhaps with the very object of securing to his family the benefits of an insurance upon his life, it is difficult to say that this is not a death by his own hand within the meaning of the policy. It has been doubted whether public policy would permit an insurance covering the case of intentional suicide by the assured while sane. But however this may be, no rational doubt can be entertained that a condition exempting the insurers from liability in case of the death of the assured by his own hand, whether sane or insane, would be valid if mutually agreed upon between the insurer and the insured.

When nothing is said in the policy with respect to insanity, the words "die by his own hand" in their literal sense comprehend all cases of self-destruction. The exceptions which have been engrafted upon these words by judicial decisions must rest upon the ground that the excepted cases could not have been within the meaning of the parties to the policy. The intent on the part of the insurer in inserting the condition is evident. The policy creates in the insured a pecuniary interest in his own death. To a man laboring under the pressure of poverty and the urgent wants of a dependent family, or of inability to discharge sacred pecuniary obligations or other similar causes, the policy offers a temptation to self-destruction. To protect the insurers against the increase of risk arising out of this temptation is the object for which the condition in question is inserted—per MAULE, J., 5 *M. & Gr.* 653. The condition ought, therefore, be so construed as to exclude only the cases in which these motives could not have operated, such as accident or delirium. (*Ibid.*) So far as considerations of public policy have any place in determining such question, they are undoubtedly in favor of confining the exceptions to the condition, to cases in which the self-destruction is clearly shown to have been accidental or involuntary." (*VanZandt v. Mutual B. L. Ins. Co.*, 55 *N. Y.* 169; *McClure v. Mutual L. Ins. Co.*, *Ib.* 651; *Contra: Breasted v. Farmers' Loan and*

Trust o., 8 N. Y. 299, and *Terry v. Mut. Life Ins. Co.*, 15 Wall. 580.)

And the same doctrine was laid down by the Supreme Judicial Court of Massachusetts in *Dean v. American Life Ins. Co.* (4 Allen, 96), where it was said that "Insanity does not necessarily operate to deprive its subjects of their hopes and fears, or the other mental emotions which agitate and influence the minds of persons in the full possession of their faculties. On the contrary its effect often is to stimulate certain persons to extraordinary and unhealthy action, and thus to overwhelm and destroy the due influence and control of the reason and judgment. In such a case suicide is the willful and voluntary act of a person who understands its nature and intends by it to accomplish the result of self-destruction. * * * * * The moral responsibility for the act does not affect the value of the hazard."

It will thus be seen that the current of authorities runs in the direction of regarding the act of self-destruction by an insured person as a breach of contract occasioning damage to the other party; and that unless the act be proved to have been involuntary, by reason of disease, it is to be construed as falling within the exception expressed in the policy. Therefore, to take a case out of the proviso of a life insurance policy relating to self-destruction, on the ground of insanity, the insured must have been so mentally disordered as not to understand that the act he committed would cause his death, or he must have committed it under the influence of some insane impulse which he could not resist; it is not sufficient that his mind was so impaired that he was not conscious of the moral obliquity of the act.

It has been held, accordingly, that under the proviso relating to self-destruction, suicide is not in itself sufficient evidence of insanity to bring the case within the exception. And if it appears that the act was premeditated and fully comprehended, and there was no positive evidence of previous insanity, the insurers are not liable. (*Fowler v. Mu-*

tual Life Ins. Co., 4 *Lans.* 202; *Terry v. Mut. Life Ins. Co.*, 15 *Wall.* 580.)

DOMICILE, TAXATION AND SUFFRAGE OF LUNATICS.

The place of residence of a lunatic is, for purposes of distribution of his personal property, where his domicile was at the commencement of his lunacy. Being thenceforward deemed *non compos*, he has no capacity to choose any other place of abode, because he is no longer a person *sui juris*. Should he die while under a committee, his residence is *prima facie* where he was domiciled at the outbreak of his disease. If, however, his residence there was constrained and involuntary, or, from the necessity of his affairs, merely transitory, then he is only a sojourner and denizen; otherwise, not. (*Bempde v. Johnson*, 3 *Ves.* 198; *Desesbats v. Berquier*, 1 *Binn.* 336, 349, *n.*) So, also, in relation to taxation, it has been held that where the guardians of a lunatic change his place of residence, intending to make that his permanent home, he becomes liable to assessment in the place so chosen by them. (*Mason v. Thurber*, 1 *R. I.* 481.) For a lunatic, like an infant, has, after office found, no other domicile than that selected by his committee or guardian.

Under the Constitution and Revised Statutes of New York, lunatics are not disqualified for exercising the right of suffrage. Judge COOLEY (*Const. Lim.* 599) seems to think that by the political law of England and this country, lunatics, in common with women, minors and aliens, are excluded from the right of suffrage, though not prohibited by constitutional limitations. He cites Mr. Cushing (*Legislat. Assemb.*, § 27) in support of these views, but neither give any American authorities in affirmance of this doctrine. We cannot see, therefore, on what grounds a lunatic's vote in the place of his residence can be refused in New York, since no statute has yet declared lunacy to be civil death.

CHAPTER EIGHTH.

OF THE TESTAMENTARY CAPACITY OF PERSONS OF UNSOUND MIND.

The frequent antagonism of interests existing between parties to a contract, has led to the necessity at law of requiring a higher degree of mental competency on their part than is generally needed to make a will. While in the case of contracts there must be capacity to analyze the terms of the agreement in their various relations to consideration or performance, together with power to comprehend the natural consequences flowing from them in the form either of advantages or otherwise, in the case of a will, little else beside memory and perception are demanded. Hence, knowledge or foresight of the *possible* consequences which may follow upon any provision in a will is not required of a testator. If he knows what he does, intends, and is free in what he does, the law will sustain the bequest, provided it is not against public policy. Within this limitation, each may distribute his own as to him seems best. *Cujus est dare ejus est disponere*. It follows from this, that less intellect is sufficient to make a will than to make a contract, although there must be present, in any event, such a degree of comprehension of its terms as will show that they have been the subject of reflection, deliberation in choice, and assent duly expressed. It is for this reason that evidence of prior bodily disease, and of different intentions previously expressed, have been held admissible in proof of incapacity at the time of making the will. (*Irish v. Smith*, 8 S. & R. 573.)

Should there be evidence of mental unsoundness immediately before making the will, and should it be present afterward, these facts would be admissible to prove derangement at the time the instrument was made.

(2 *Grlf. Evid.*, § 690 ; *Dickinson v. Barber*, 9 *Mass.* 225.) But, inasmuch as the law presumes every man to be of sane mind until the contrary appears, the burthen of proof falls necessarily upon the party impeaching the validity of the will upon the ground of insanity. When this condition, however, is proved to have existed as a permanent status, distinguishable from the temporary delirium of fever, then the burthen of proof is shifted to him who alleges sanity at the time of the transaction, and he can only rebut the presumption of continuing derangement by showing that the act was done in a lucid interval. (2 *Grlf. Evid.*, § 689 ; *Atty.-Genl. v. Parnter*, 3 *Bro. Ch.* 441 ; *Ex parte Holyland*, 11 *Ves.* 11 ; *White v. Wilson*, 13 *Ib.* 87 ; *Cartwright v. Ib.*, 1 *Phil.* 100 ; 1 *Wms. on Exrs.* 17, 30 ; 1 *Jarman on Wills*, *ch.* 3.)

The terms, insanity, mental derangement, unsoundness, and monomania, are terms of such variable significance that their value in any given case will depend, at law, entirely upon the relation which they bear to a particular person, in connection with particular acts. They simply describe a sliding scale of mental disorder or enfeeblement, expressing different degrees of determination. Such terms are subject, therefore, to whatever interpretation the mind of the observer may choose to give them. And inasmuch as the angle of vision determines the parallax of the object viewed, it follows that a mental act may wear a very different aspect to two minds beholding it simultaneously, but from different stand-points. Then, too, there are as various degrees of mental capacity among minds that are impaired as among minds that are unimpaired. The effects of impairment are only relative. There have been minds notoriously impaired, whose powers of action and productiveness far transcended those of the majority of sane minds. They could afford to lose some of their strength, and yet have enough left with which to perform useful and meritorious acts.

What constitutes mental capacity at law is a question to be ultimately determined as much by the character of the act as by the state of mind of the actor, for a rational act, rationally done, is the best proof that can be offered of a rational agent; and if performed intentionally, and without undue influence, that is to say, with entire freedom of action, it will be sustained, although the testator may be laboring under the disadvantages of mental infirmity. When the element of delusion is super-added to such a condition of mind, the plane over which that delusion may travel makes it very necessary to study and inquire into the limits of its extent, and the acts which it may have infected. But it must be borne in mind that there are subjects to which the stigma of delusion is attached without any other reason than that our prejudices are opposed to recognizing opinions upon them as truths. We may not be able to disprove them, while at the same time they may not be susceptible of the same proof which we exact in other things. We therefore reject them altogether from the sphere of evidential facts, and call them captivating errors of the mind. Nevertheless, minds as sane as any can be believe in them, and govern their lives accordingly. This is particularly the case in matters relating to religious belief, to disembodied spirits, and to a future life. Are such minds, because of their dissent from our assumed orthodoxy, necessarily insane? Are they without testamentary capacity on that account alone? If so, then mental competency before the law is simply a question of mental majorities, and all non-conformists are lunatics. Who, then, is sane? *Mutato nomine de te fabula narratur.*

But the law is wiser than to engraft popular prejudices upon her canons. She truthfully draws the picture of an insanely deluded person, by describing him as one who persistently believes supposed facts which have no real existence, against all evidence and probability, and conducts himself upon the assumption of their existence, so

that, as far as such subjects are concerned, he is essentially mad or insane on those subjects, though on other subjects he may reason, act and speak like a sensible man. (*Dew v. Clark*, 3 *Add. Ecc. R.* 79.) But at the same time she decides that the mere fact that a testator is subject to insane delusions is not sufficient reason why he should be held to have lost his right to make a will, if the jury are satisfied that the delusions have not affected the general faculties of his mind and cannot have influenced him in any particular disposition of his property. (*Banks v. Goodfellow*, 39 *L. I. Q. B.* 237; 5 *L. R. Q. B.* 549.) It is plain that what are called perverse opinions or unreasonable prejudices do not *per se* constitute mental alienation. These conditions, however much to be regretted, may co-exist with perfect sanity and competency to perform a legal act or to commit a crime. They are rather moral than intellectual perversions, affecting the freedom of the individual in matters which are largely self-regarding, and thus not necessarily, if at all, trenching upon the right of others. Perversion of moral feelings, not accompanied by insane delusions, is not, therefore, sufficient to invalidate a will. (*Frere v. Peacock*, 1 *Rob. Ecc.* 422; 2 *Griff. Evid.*, § 689, *n*; *Am. Seam. Fr. Soc'y v. Hopper*, 34 *N. Y.* 619.)

On the other hand, if a testator, at the time of making his will, be laboring under such delusion in respect to those who would naturally have been the objects of his testamentary bounty, and the court can see that the dispositive provisions were, or might have been caused or affected by such delusion, such instrument is not to be deemed his will. (*Am. Seam. Fr. Soc'y v. Hopper*, 33 *N. Y.* 619.) And in full affirmance of this doctrine, which is supported by leading authorities both in England and in other States of this Union, it has been again held in a very recent case that a monomaniac cannot make a valid will if the delusion, which affects the general soundness of his mind, relates to the subject or objects of the will, or to the persons who

would otherwise be likely, ordinarily, to be the recipients of his bounty, or where the provisions of the will are connected with, and influenced by the particular delusion, (*Lathrop v. Borden*, 5 *Hun*, 560.)

From whatever standpoint it may be viewed, whether as a medical question relating generally to mental disorders, or a legal question relating to mental capacity *quoad hoc*, the problem of how much weight should be given to delusions as a legal test, is not always an easy one to solve, particularly by an appellate tribunal. A question of testamentary capacity in such case is so much a question of fact, and enters so generally into the personal history of the testator and of his family, that it cannot be left to any abstract proposition in law, to determine how far the mental capacity of the testator has surrendered to the influence of a delusion. Hence, as has been pointedly said, "it is only the court before whom the witnesses appear that can dispose of it satisfactorily." (*Gardiner v. Gardiner*, 34 *N. Y.* 155.) For closely connected with the subject of testamentary capacity lies that equally perplexing one of undue influence, a presumption arising as a corollary to the former, since self interest in heirs and would-be legatees may safely be suspected of endeavoring to operate upon a weak-minded testator, so as to exercise by insensible coercion a guiding influence over his mind. Hence wills made by weak-minded persons, or those laboring under any degree of mental infirmity, should always be scrutinized because liable to the two misguiding elements of disease or undue influence.

Under our Revised Statutes, Part 2, Chap. 6, Tit. 1, Art. 1, § 1, relating to WILLS, it is enacted that, "All persons except *idiots, persons of unsound mind and infants*, may devise their *real* estate by a last will and testament, duly executed according to the provisions of this title," and in like manner by Art. 2, § 21, it is enacted that "every male person of the age of eighteen years or upwards, and every female

of the age of sixteen years or upwards, of *sound mind and memory*, and no others, may give and bequeath his or her personal estate, by will in writing."

The statute follows the common law strictly in this particular, and repeats in fact the provisions of the statute of wills (34 & 35 *Hen. 8, ch. 5, § 14*), which declares that wills or testaments made of any lands or hereditaments by any idiot, or by any person *de non-sane memory*, shall not be taken to be good or effectual in law. (*Shelford on Lunatics*, p. 361.) The terms "unsound mind" and "*non compos mentis*" are at common law synonymous, and have a determinate legal signification, importing not weakness of understanding, but a *total* deprivation of sense. (*Foster v. Means*, 1 *Speer's Eq.* 569.) Whatever form or degree of mental weakness may be present, short of total deprivation, or whatever degree of partial unsoundness may exist, involving even delusion *quoad hoc*, none of these things will, of themselves, annul testamentary capacity, unless either the mental impairment be general and overshadowing, or the delusion enter into and infect the subject-matter of the will. Thus in *Bleecker v. Lynch* (1 *Bradf.* 360), it was held that loss of memory did not incapacitate unless it be total or appertains to things essential. And again, in *Reynolds v. Root* (62 *Barb.* 250), the court said that impairment of faculties by age or injury to a considerable degree, does not necessarily affect testamentary capacity. (*Van Alst v. Hunter*, 5 *Johns. Ch.* 148; *Maverick v. Reynolds*, 2 *Bradf.* 360.)

WHAT CONSTITUTES CAPACITY TO MAKE A WILL.

Coke's dictum on this subject has always remained the universally adopted rule, viz. : that "it is not sufficient that the testator have a memory, when he makes his will, to answer familiar and usual questions, but he ought to have a *disposing* memory, so that he is able to make a disposition of his lands with understanding and reason ; and that

is such a memory as the law calls perfect." (*Marquis of Winchester's case*, 6 *Rep.* 23.) The subject underwent full discussion in the Judicial committee of the Privy Council, where it was agreed that "in order to constitute a sound, disposing mind, the testator must not only be able to understand that he is by will giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property." (*Harwood v. Baker*, 3 *Moore's P. C.* 290 ; *Goldie v. Murray*, 6 *Jur.* 608 ; *Clark v. Fisher*, 1 *Paige*, 171.)

In the leading case in our State upon this point, the Court said, that "the testator must have sufficient mind and memory to be able to understand that he is making his will, and how he is doing it, and its effect, both upon his property and upon those who would receive it after his decease, without leaving a will." (*Delafield v. Parish*, 25 *N. Y.* 9.) Such a degree of mental power as this test would require implies the possession of perception, memory and judgment to a very large extent. And in the case of a multiform estate like Mr. Parish's, the necessity for exercising these powers skillfully, and of possessing them in vigor, will be admitted by all, as a condition precedent to distributing it with a full understanding of its effect upon heirs and legatees. It will be perceived from the foregoing rulings that it is not necessary that insanity should be present in order to create testamentary incapacity, and the question turns so much on general capacity that wills have been found void where the testator would not, if living, have been found insane. (*Sloan v. Maxwell*, 3 *N. J. Eq.* 563 ; *Converse v. Ibid.*, 21 *Vt.* 168.)

As has been heretofore shown, it is everywhere agreed that mere feebleness of mind does not *per se* incapacitate a person from making a valid will. (*Stewart v. Lispenard*, 26 *Wend.* 255 ; *Blanchard v. Nestle*, 3 *Den.* 37 ; *New*

house v. Godwin, 17 *Barb.* 236 ; *Petrie v. Shoemaker*, 24 *Wend.* 85 ; and see note to 3 *Den.* 37.) The law accords the same right of disposing of their own to the weak-minded which it does to the strong. If they need protection against fraud or undue influence, if they have been induced to perform any act under restraint, it is not properly their act, and equity will afford relief against its consequences. But outside of these exceptions mere weakness of mind does not produce civil disfranchisement. It has also been decided that a weak memory does not, for the same reasons, create testamentary incapacity. (*Bleecker v. Lynch*, 1 *Bradf.* 458.) Weakness, in law, is thus seen to be contra-distinguished from disease, of which, while often the result, it is still not always the companion. The current of authorities favors the doctrine that until weakness is merged into actual impairment of reason, and there is consequently demonstrable mental unsoundness, testamentary capacity is still present. But there need not be obliteration either of mind or memory, which would evidently constitute dementia. It is sufficient if the incapacity be general in extent, though not complete with reference to any particular faculty. And the entire incapacity of the testator in relation to the particular act must be shown. (*Crolius v. Stark*, 7 *Lans.* 311.)

The great latitude thus given to testamentary capacity is nowhere more strikingly illustrated than in one of Surrogate Bradford's decisions, wherein he holds that "testamentary capacity is consistent, especially in very aged persons, with a great degree of mental infirmity, and some degree of mental perversion or aberration at times, provided there is satisfactory proof that the testator, at the time of the execution of his will, really did comprehend the import and scope, and was not under the control of any improper or undue influence, or of any deception or delusion." (*Moore v. Moore*, 2 *Bradf.* 261.)

The basis upon which rests the legal definition of testa-

mentary capacity is thus seen to be what COKE designated as a "*disposing* memory." This qualification is a sound one and founded upon a law of our mental organization, which deserves more attention in the judgments of courts than it seems to have received. It does not require much observation to discover that there are various grades of memory, even among those recognized as good. A person may have an excellent one for dates and names, and yet have a very poor one of faces or events. There is such a thing as a verbal memory, a memory of numbers, a memory of ideas, without at the same time a memory of the events in which those ideas had their origin, and the contrary may also happen. Lord CAMPBELL, in his *Lives of the Chancellors*, draws this graphic picture of the differences in the character of memory possessed by those two distinguished brothers, Lords STOWELL, and ELDON. "When asked to give an account of the sermon, their father's weekly custom, William (Lord STOWELL) would repeat a sort of digest of the general argument, a condensed summary of what he had heard—John (Lord ELDON), on the other hand, would recapitulate the *minutiæ* of the discourse, and reiterate the very phrase of the preacher. (Vol. 8th, p. 330.) Lord MACAULAY possessed the same remarkable verbal memory.

In striking contrast with the mental calibre of such intellectual giants, and as showing that general mental power has little to do with memory, stands the remarkable fact of the so-called historical idiot of Earlswood, who could repeat page after page of Hume's *History of England*, none of which he understood; or of that musical negro idiot, blind Tom, who can perform the most difficult piece of music after hearing it played, and without any knowledge of the philosophy of music. If there be any law well established in mental philosophy, it is that memory bears no direct relation to mental power, or to capacity of understanding. An old person often astonishes us by the accuracy of his memory of long past events,

who readily forgets what transpired yesterday, and whose good judgment on general subjects, no one questions. Memory is thus seen to be largely involuntary.

It is not to the domain of this faculty, therefore, that we should look for such tests of mental capacity as are included at law in the term "*disposing*" memory. The faculty on which we ultimately depend for all voluntary or desired knowledge of that which we know and wish to recall, is the faculty of *recollection*. It is a wider and farther reaching faculty than memory, in that it reconstructs, piece-meal, the elements of our past knowledge, and shows continuing mental capacity to grasp and compare those elements and thus to form a judgment upon them. A *disposing* memory, in the law of testamentary capacity, means nothing less than the capacity to know and name one's own property, as also to know the consequences attaching themselves to making or not making a testamentary disposition of it.

Under the operations of this law of our mental constitution, it will be perceived that a very nice point of distinction may be taken in this connection between *memory* and *recollection*, in relation to capacity to dispose of installments of property, variously invested, so as to suit such disposition to the individual objects of a testator's bounty. Memory is so largely automatic and involuntary in its scope, that a child, or even an idiot as before shown, may have a good memory of certain things, particularly those that are connected with past emotional states, while at the same time having no power of *recollecting* such abstract ideas, as are represented by figures or sums of money. So, a testator might have a good memory of general historical facts belonging to himself or family, and of his affairs, and yet have no power of recollecting the details of his estate, or the effects of devising or bequeathing individual portions to certain objects of his bounty already provided for in law ; or the proper relative claims of those

objects, if charitable corporations, as set opposite to the claims of marriage, kindred or legal creditors. It is evident, therefore, that there may be a good memory without much mental capacity. But on the other hand there cannot be a ready comparing memory without mental power, and still more evidently there cannot be a good or accurate recollection without high mental power, since, as LOCKE expresses it, "Recollection is when an idea is sought after by the mind, and with *pain* and *endeavor* found and brought again in view." Now, how much endeavor a weakened mind can make, what tension in effort it can undergo, and how well it can succeed in mastering the problems of testamentary disposition, are the crucial tests of its disposing capacity.

Unsoundness of mind, as a legal status, demands for its proof evidence of a wider sphere of disordered action than is required psychologically to establish the mere physical fact of mental impairment. To an expert in mental disorders many a man may exhibit symptoms of mental unsoundness, which at law would not be accepted as synonymous with the condition designated by it as *non compos mentis*. Even the fact that a person has been sent to an asylum is not legal proof of his insanity. (*McAdam v. Walker*, 1 *Dow's Par. R.* 178.) Applying these rules to the subject under discussion, it will be logically deduced from them that testamentary capacity is not a mental condition to be judged of by a single act, or the state of a particular faculty as to relative weakness; but on the contrary it is a fact to be arrived at by a general survey of all the faculties when exercising themselves without restraint upon a series of related propositions. In the words of Sir JOHN NICOLL, "It is a great, but not uncommon error to suppose that, because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will for any purpose, whereas the rule of law, and it is the rule

of common sense, is far otherwise; the competency of the mind must be judged of by the nature of the act to be done, from a consideration of all the circumstances of the case." (*Marsh v. Tyrrell*, 2 *Hagg.* 122.)

Even the presence of a confirmed delusion, although psychologically expressing mental unsoundness, is not such unsoundness at law as destroys necessarily testamentary capacity. Hence the doctrine of partial insanity has been received with approbation in our courts, because tending to favor the freedom of testamentary dispositions, so long as that freedom can be shown to have remained unimpaired by the particular delusion. (*Dew v. Clark*, 3 *Add.* 79; *Brick v. Brick*, 66 *N. Y.* 144.)

Accordingly it has been held to be no evidence of insanity in a testator that some of his actions and language indicated eccentricity, vulgarity or violence of temper. (*Shelford on Lunacy*, p.51.) And where even the eccentricity was pushed into the domain of manifest mental unsoundness, the will was sustained. (*Lee v. Lee*, 1 *McCord*, 183.) There can be no question that eccentricity in manners or pursuits is quite compatible with perfect mental health. When, therefore, the sanity of an individual is called into question, his natural character should be carefully investigated, in order to determine whether the apparent indications of insanity are not the expression of ordinary and habitual states in him. This is all the more necessary because it has been repeatedly decided that neither peculiarity of character, weakness of understanding, nor want of capacity to transact the ordinary affairs of life, will disqualify one to execute a will. (*Potts v. House*, 6 *Ga.* 324; *Stubbs v. Houston*, 33 *Ala.* 555; *Mercer v. Kelso*, 4 *Gratt.* 106.)

The case of *Stewart v. Lispenard* (26 *Wend.* 255), sustaining the will of an imbecile, and re-affirmed in *Blanchard v. Nestle* (3 *Den.* 37), has always remained the leading case in New York, upon the degree of mental capacity requisite to make a will. It is true, doubtless, that in

Delafield v. Parish (25 N. Y. 91), the authority of *Stewart v. Lispenard* was questioned, and a general opinion has gone abroad that the case itself was overruled. But the two cases are in no sense analogous, and the ground upon which the authority of the former was doubted is one affecting the circumstances under which it was heard and decided and not the law upon which it rests. That principle of law has long been considered as out of the pale of discussion, and it is forcibly expounded in the words of the Court of Errors, saying, that "Courts in passing upon a will do not measure the extent of the understanding of the testator, for if he be not totally deprived of reason, whether he be wise, or unwise, he is the lawful disposer of his property, and the will stands as a reason for his actions." (26 Wend. 255.) That this latter case represents the doctrine of both English and American Courts from the earliest times down, can be easily demonstrated. There is in fact hardly an exception to be found to the principle, and it was, to say the least, unfortunate, that the court in *Delafield v. Parish* should have re-opened the question without at the same time deciding it.

Judge REDFIELD, in his volume of *Leading Cases on the Law of Wills* (p. 274), while citing *Stewart v. Lispenard*, says unhesitatingly, "I am constrained to say that these doctrines are in accordance with the authorities." And beginning with SWINBURNE, he traces the line down to the most recent decisions. There certainly is very little, if any, resemblance between the cases of Alice Lispenard and Mr. Parish. The former was an imbecile through life, neither advancing nor retrograding, but living constantly in a state of mental infancy; the latter was a mind which from the shock of paralysis and the structural changes in the brain accompanying it, had faded out into complete dementia. The positive deterioration of brain tissue in Mr. Parish's case was an evidential fact, the extent of which was physically dis-

cernible in many ways, and its mental consequences involved, so far as experts could read them, the entire circle of his faculties. Alice Lisperard's imbecility was as far above Mr. Parish's mental condition, as a five years old child's is above that of a helpless and speechless infant. She at least could make a will, such as it was, and did so, while he, on the contrary, could neither speak, write, nor apparently understand what was said to him. Had he been born in that condition he would have been justly styled an idiot. In admitting, therefore, the justice of the decision in the case of Mr. Parish, we see no reason to construe it into a disaffirmance of the preceding and accepted authorities upon testamentary capacity.

In *Delafield v. Parish* (25 N. Y. 9), the old common law doctrine was re-affirmed, that presumptively every man is to be deemed *compos mentis* until the contrary appears; also that the burthen of proof is upon him who alleges that an unnatural condition of mind existed in the testator. At the same time the court said that the burthen of establishing the will, as the wished or expressed intention of a free and competent testator, was upon the proponents. If by this latter opinion it is meant that the burthen of proving that the testator was competent to *execute* his will, in the estimation of the subscribing witnesses thereto, and that he signified his assent and intention to them by signing it in their presence, as proof of his comprehension of the act and of his freedom from restraint while doing it—if this be the *onus probandi* resting upon the proponents, there can be no question of its accordance with both English and American authorities. (*Barry v. Butlin*, 2 *Moore's P. C.* 480; *Browning v. Budd*, 6 *Ib.* 430; *Baker v. Batt*, 2 *Ib.* 317; *Crowinshield v. Ib.*, 2 *Gray*, 526; *Gerrish v. Nason*, 22 *Me.* 438; *Cilley v. Cilley*, 34 *Ib.* 162; *Redfield Lead. Cas.*, p. 168.) But if, on the contrary, it be meant that although sanity is always presumed to exist at law until

the contrary be proved, yet when a will is the subject of adjudication, the sanity of the testator must be proved before it has been questioned, thus negating a presumption of law in advance of its rebuttal, we can only say that, if whatever is against reason is against law, the doctrine has no foundation to rest upon.

Again, it was held in this same case that if the testator be "*compos mentis* he can make any will, however complicated; if not *compos mentis* he can make no will, not the simplest." And it was further said that "the question in every case is, had the testator as *compos mentis* capacity to make a will, not had he the capacity to make the will produced."

The above doctrine when thus stated without qualification appears to us so general and sweeping, as to be misleading. Thus it will not be contended that what is against reason can be good in law, and certainly it is unreasonable to say that if a man be *compos mentis* he is thereby mentally qualified to make any kind of will simply because the law allows him the right of experimenting in this direction.

This form of stating the doctrine practically assumes that *all* wills are alike in respect to their demands upon mental capacity to comprehend them, and that it is a matter of indifference how complicated the will may be, or how inferior the intelligence of the testator, for if he can make the simplest bequest of personal property, he can make the most complicated will relating to real property under all the contingencies to which the law of succession exposes it. Of course, if a man have the legal right to make a will, he may make that instrument in any form he chooses. But when that will is propounded for probate, is not the first question asked, whether the instrument is, not a will made by A. B. but *the* will, all others being first revoked and annulled? And if it be shown that he never could have made that particular will, being beyond his

comprehension, and, therefore, not expressing his intentions, although at a different age and with more mental vigor he could have made it, what avails it to say that being shown competent to have made some kind of a will, he must be presumed competent to have made this or any other will that he chose, simply because he had the legal right to try?

Now, wills differ in character as much as do poems, and if the authorship of a poem were in issue, would any court hold that it mattered not what the degree of intelligence of a writer was, so that, as long as no other person claimed the poem, he must be adjudged its author, notwithstanding he could neither comprehend nor express its ideas, or parse its construction? Yet, this is practically the doctrine laid down in the Parish case as quoted above, a doctrine which is daily violated, because it is a virtual surrender of the right of the probate court, when a will is contested, to determine whether *the* will propounded is an instrument which the testator made intelligently and intentionally; and if he had not mental capacity to make it, or if it was the will of another speaking through him, that then the court will pronounce it invalid, not being estopped by the doctrine that because he was *compos mentis* to make *a* will, he was competent to make *any* will and must, therefore, have made the one in issue.

The doctrine of the Parish case is sound so far as it relates to the abstract legal right to make a will, but when it recites that the question in the case of a will contested on the ground of mental incapacity is "had the testator as *compos mentis* capacity to make *a* will," not had he the capacity to make *the* will produced, we submit that there being no other question before the court save that of the connection between the testator and the particular will produced, that instrument being the exponent of his mental capacity, of his intentions and his freedom from undue influence, we do not see how the court can go outside of that record to find any basis upon which

to determine what in fact was the mental capacity of the testator to make any other will than the one actually produced. It is manifestly a *non sequitur* to assert that because a man has mental capacity sufficient to make a will he has capacity enough to make *any* will which may be ascribed to him, and that the particular will in issue cannot be used as a test of the mental capacity of its maker, although generically it is as much a will as any other. In cases of this kind, therefore, the only proper questions to be decided would seem to be the following, viz. :

First. Whether the testator had mental capacity sufficient to make *the* will produced, because if he had not, then it was not his will.

Second. Whether that will correctly expresses his intentions, because if it does not, then it was not his will.

Third. Whether at the time of making or executing the will he was under duress or undue influence, because if he was, then it was not his will.

The judgment pronounced in the Parish will case reaffirmed the doctrine now universally recognized, as to what constitutes, at law, testamentary capacity. In the language of that opinion "the testator must have sufficient mind and memory to be able to understand that he is making his will and how he is doing it and its effect both upon his property and upon those who would receive it after his decease without leaving a will." (*Ean v. Snyder*, 46 Barb. 230; *Kinne v. Johnson*, 60 Barb. 70.)

UNDUE INFLUENCE.

It is obviously very difficult to give any general definition of undue influence, since it is impossible to determine at the outset the resisting power of any mind to extraneous influences. Remembering, also, that the peculiar surroundings of a testator, whether in respect to his own family and apparent heirs, his state of moral obligation to some of these in excess of others; or again, his obligations to stran-

gers for favors received, and the gratitude thereby evoked on his part toward them; remembering these incentives to prejudice and preference for certain persons over others, there can be no general rule laid down by which to regulate the quantum of intimacy or counsel which one may share with a testator, without at the same time sensibly influencing his judgment. It is a well-known principle of mental philosophy, that a strong mind always overpowers a weaker mind with which it is brought into contact by a process akin to benumbing, so that the closer the relationship the sooner the subjugation. And this may all happen without, as well as by, intentional effort. We all surrender to our mental masters as soon as we meet them face to face. It may be hard—it may work harm at times by putting us in the power of a depraved mind. But so the law is written. *Durum sed ita lex scripta est.*

The law practically recognizes this canon of our mental constitution by attaching to undue influence a meaning synonymous with *constraint*. It recognizes it as the exercise of such power over another's mind as serves practically to dethrone his will and to substitute ours in its place. In other words, it is a real transfusion of mind. Therefore, that only is undue influence which amounts to constraint, and which substitutes the will of another for that of the testator. And this may be accomplished either by threats or by fraud. (*Eckert v. Flowery*, 43 Penn. St. 46.) But undue influence in the procurement of a will must be a present constraining and operative power upon the mind of the testator, in the very act of making the testament. Influence, however improper, if long past and gone, and not shown to be in any way operative in producing the will, is no ground for its impeachment. (*McMahon v. Ryan*, 20 Penn. St. 329.)

But whatever meaning may be attached to the term "undue influence," and in whatever form it may exhibit itself, it is to be considered always as a perverting power, misdi-

recting a mind competent to act legally in disposing of property, but unable to protect itself against the insidious and constraining influences of a person who has practically subjugated it to its own uses. Therefore, it is no evidence of original testamentary incapacity that a person has obeyed the will of another rather than his own. Consequently, it has been repeatedly held that the objection to any will on the ground of undue influence always implies that the testator had sufficient mental capacity to make a valid will, but that the will in question was not his own free and voluntary act, but was in fact a will imposed upon him by others. (*Kinne v. Johnson*, 60 *Barb.* 70; *Newhouse v. Godwin*, 17 *Ib.* 236.)

The following synopsis represents the doctrines held by the courts of New York in adjudicating upon questions of testamentary capacity and undue influence.

1. The power of legally assenting to a will is conceded by the statute to all classes of persons, except those totally wanting in reason and understanding. Within this exception no difference is made between strong and weak-minded persons, however low may be the degree of intelligence of the latter. The only question in such cases is, whether, without fraud or restraint, they have exercised the power possessed by them.

2. To be capable of making a valid will, the testator must be able to dispose of his property with sense and judgment in reference to its situation or condition, its amount, and the relative claims of those who are or might be the objects of his bounty. (*Clark v. Fisher*, 1 *Paige*, 171; *Clark v. Sawyer*, 2 *Barb. Ch.* 411; 2 *N. Y.* 498; *Reynolds v. Root*, 62 *Barb.* 250; *Forman v. Smith*, 7 *Lans.* 443; *Dumont v. Kiff*, 7 *Ib.* 465.) 3. If the testator has mental capacity to make a will, he can make any will (*Delafield v. Parish*, 25 *N. Y.* 9; *Ean v. Snyder*, 46 *Barb.* 230; *Forman's Will*, 54 *Barb.* 274; 1 *Tuck.* 205; *Brush*

v. *Holland*, 3 *Bradf.* 461; *Seguine v. Seguine*, 4 *Abb. Ct. App. Dec.* 191; 3 *Keyes*, 663.)

But the burden of establishing the will, as the will of a free and capable testator, is upon the party propounding the instrument. (*Delafield v. Parish*, 25 *N. Y.* 9; *Crispel v. Dubois*, 4 *Barb.* 393; *Burritt v. Silliman*, 16 *Ib.* 198; *Crowningshield v. Ib.*, 2 *Gray*, 526; *Gerrish v. Nason*, 22 *Me.* 433; *Cilley v. Ib.*, 34 *Ib.* 162; *Newhouse v. Godwin*, 17 *Barb.* 236; *Clarke v. Sawyer*, 3 *Sandf. Ch.* 357; *Barry v. Butlin*, 1 *Curt.* 637; 2 *Moore's P. C.* 480; *Browning v. Budd*, 6 *Ib.* 430; *Panton v. Williams*, 2 *Curteis*, 530; 2 *Notes of Cases, Supplement*, 21-9; *Baker v. Batt*, 2 *Moore's P. C.* 317; *Lee v. Dill*, 11 *Abb. Pr.* 214.)

4. The formal execution of the will being proved, the burthen of showing either mental incapacity or undue influence rests upon the contestants. (*Ean v. Snyder*, 46 *Barb.* 230; *Allin v. Pub. Adm'r*, 1 *Bradf.* 378.)

5. Sanity is always to be presumed until the contrary is shown. (*VanDusen v. Ib.*, 5 *Johns.* 144; *Taylor's Will, Edm. S. C.* 375; *Brown v. Torrey*, 24 *Barb.* 583; *Christy v. Clark*, 45 *Ib.* 529.)

6. The finding of insanity on a commission *de lunatico* is not conclusive of incapacity to make a will. (*Taylor's Will, Edm. S. C.* 375.)

7. Insane delusions are such as no sane person ever entertains.

Partial insanity (as so called) will defeat a will in any way produced, or affected by it.

In border cases, the dispositions of the will afford great aid in determining the capacity of the testator. (*Am. Seamen's Friend Soc. v. Hopper*, 33 *N. Y.* 619; *Stanton v. Wetherwax*, 16 *Barb.* 259.)

8. If insanity be shown to exist before the making of the will, its continuance is presumed, and it is necessary to show a lucid interval at the time of its execution, which,

however difficult to prove, must be clearly shown. (*Gombault v. Pub. Ad.*, 4 *Bradf.* 226; *Taylor's Will*, *Edm. S. C.* 375; *Clark v. Fisher*, 1 *Paige*, 171; *Jackson v. King*, 4 *Cow.* 207; *Jackson v. Van Dusen*, 5 *Johns.* 144, 159; *Cook v. Cook*, 53 *Barb.* 180; See, per contra, *Searles v. Harvey*, 6 *Hun*, 658.)

9. The mind, although weak, as in imbeciles, is to be held sound for the purpose of making a will, until there is a total loss of understanding, or supervening idiocy, or until it labors under a delusion which infects the subject, matter of the will. So long as one is *compos mentis* he may make his will, if not acting under undue influence. (*Stewart v. Lispenard*, 26 *Wend.* 255; *Blanchard v. Nestle*, 3 *Den.* 37; *Pilling v. Pilling*, 45 *Barb.* 86; *Newhouse v. Godwin*, 17 *Ib.* 236; *Van Pelt v. Ib.*, 30 *Ib.* 134; *Crolius v. Stark*, 64 *Ib.* 112; *Bleecker v. Lynch*, 1 *Bradf.* 458; *Davis v. Culver*, 13 *How. Pr.* 62.)

10. Testamentary capacity implies that the testator knew what he was doing, and how he was doing it. And the inquiry is not whether the testator had a perfect mind and memory, but whether he had sufficient thought, judgment and reflection to comprehend the act. A knowledge of what he was about, and how he was disposing of his property and the purpose so to do it, are all the law requires to constitute testamentary capacity. (*Delafield v. Parish*, 25 *N. Y.* 9; *Van Guysling v. Van Kuren*, 35 *Ib.* 70; *Kinne v. Johnson*, 60 *Barb.* 69; *Watson v. Donnelly*, 28 *Ib.* 653; *Ean v. Snyder*, 46 *Ib.* 230; *Reynolds v. Root*, 62 *Ib.* 250; *Rollwagen's Will*, 48 *How. Pr.* 289; *Ibid.*, 3 *Hun*, 121.)

11. Drunkenness may destroy testamentary capacity for the time, or, if long continued, may destroy it permanently, by producing imbecility or insanity. But an habitual drunkard, while in charge of a committee, is not necessarily incompetent to make a will. (*Lewis v. Jones*, 50 *Barb.* 645.)

12. Suicide affords no presumption *per se* of insanity but it may be considered in connection with other testimony, as tending to show mental perversion. (*Burrows v. Burrows*, 1 *Hagg. Ecc.* 109; *McAdam v. Walker*, 1 *Dowl.* 179; *Brooks v. Barrett*, 7 *Pick.* 94; *Chambers v. Proctor*, 9 *Burt.* 415; *Fowler v. Mut. Life Ins. Co.*, 4 *Lans.* 202; *Breasted v. Farmers' Loan & Tr. Co.*, 4 *Hill*, 73.)

13. Undue influence to defeat a will must destroy free agency; it must amount to force or fraud. (*Newhouse v. Godwin*, 17 *Barb.* 236; *Carroll v. Norton*, 3 *Bradf.* 291; *Gardiner v. Ib.*, 34 *N. Y.* 155; *Blanchard v. Nestle*, 3 *Den.* 37; *Tunison v. Ib.*, 4 *Bradf.* 138; 22 *Wend.* 526; *Tyler v. Gardiner*, 35 *N. Y.* 559; *Kinne v. Johnson*, 60 *Barb.* 69; *Hazard v. Hefford*, 2 *Hun.* 445; *Bleecker v. Lynch*, 1 *Bradf.* 458; *Creely v. Ostrander*, 3 *Bradf.* 107; *Wilson v. Moran*, 3 *Ib.* 172; *O'Neil v. Murray*, 4 *Ib.* 311; *Davis v. Culver*, 13 *How. Pr.* 62; *Delafield v. Parish*, 25 *N. Y.* 9; *Sherman's App.*, 16 *Abb. Pr.* 397, n; *Wightman v. Stoddard*, 3 *Bradf.* 393; *Julke v. Adam*, 5 *N. Y. Surr.* [1 *Redf.*] 454; *Laeycraft v. Simmons*, 3 *Bradf.* 35; *VanHanswyck v. Wiese*, 44 *Barb.* 494; *Seguine v. Ib.*, 4 *Abb. Ct. App. Dec.* 101; *Brush v. Holland*, 1 *Bradf.* 461; *Clark v. Davis*, 1 *Redf.* 249; *Terhune v. Brookfield*, *Ib.* 220; *Mowry v. Silber*, 2 *Bradf.* 133; *Vreeland v. McClellan*, 1 *Ib.* 393; *Leake v. Ranney*, 33 *Barb.* 49; *Coffin v. Ib.*, 23 *N. Y.* 9; *Weir v. Fitzgerald*, 2 *Bradf.* 42; *Allen v. Pub. Adm'or*, 1 *Ib.* 378; *Morrison v. Smith*, 3 *Ib.* 209; *Butler v. Benson*, 1 *Ib.*; 1 *Barb.* 526; *Maverick v. Reynolds*, 2 *Bradf.* 360; *Limburger v. Rauch*, 2 *Abb. Pr. [N. S.]* 279; *Matter of Paige*, 62 *Barb.* 476; *McGuire v. Kerr*, 2 *Bradf.* 244; *Matter of Romaine*, 6 *N. Y. Leg. Obs.* 156; *McSorley v. Ib.*, 2 *Bradf.* 188; *Hutchings v. Cochran*, 2 *Ib.* 295; *Thompson v. Quimby*, *Ib.* 449.)

14. The maxim *qui se scripsit haeredem*, or as it is writ-

ten in the Digest "*quum quis sibi hereditatem aut legatum adscripsit*" (Lib. XXXIV, Tit. VIII, § 1), although not fully recognized in this State, will yet be applied to the extent of requiring proof that the party executing the will clearly understood and freely intended to make that disposition of his property which the instrument purports to direct. (*Delafield v. Parish*, 25 N. Y. 9 ; *Crispell v. Dubois*, 4 Barb. 398 ; *Julke v. Adam*, 1 Redf. Surr. 454, 461 ; *Newson v. Newson*, 2 Keyes, 229 ; *Tyler v. Gardiner*, 35 N. Y. 559, 589 ; 1 Redf. Surr. 1, 130, 149.)

DISEASES AFFECTING TESTAMENTARY CAPACITY.

It is eminently proper in this connection to notice the fact that certain diseases have a peculiarly disturbing action upon the brain, which, though not necessarily indicative of mental unsoundness, yet often gives rise to effects fully as expressive in their features as are those belonging to actual brain-lesions. This is particularly the case with diseases of the abdominal organs, belonging to the excretory class. Bright's disease of the kidney, which is a form of granular degeneration of that organ, is very prone, in its advanced stages, to diminish the amount of urea excreted through this channel, and thus to cause the retention in the blood of a substance notoriously stupefying and poisonous to the nervous centres. In fact, the blood being only partially depurated, uræmic poisoning may be said to be constantly present during the latter stages of this disease. In this condition, the circulation in the brain being largely compromised, the mind becomes depressed, confused, and at times suicidally disposed. "An unhealthy condition of the blood from arrested action of the kidneys," says an eminent expert, "will produce convulsions, paralysis, furious delirium, prostration of the intellectual faculties and fatal coma not to be distinguished from sanguineous apoplexy." (*Opinion of Dr. I. Watson, in Parish Will Case, in Medical Opinions*, p. 269.)

Aside from these indicia of profound uræmic intoxication, latent tendencies to delirium also manifest themselves at times, associated with moroseness, peevishness and vagaries of mind.

So, too, diseases of the genito-urinary organs occurring in old age have an overpowering and depressing influence upon the mind, weakening resolution, creating vacillation of purpose and a child-like dependence upon others. No other diseases so quickly assail and pull down the manhood of the individual, and none more emphatically constitute that "thorn in the flesh" which subdues even the proudest spirit. In this condition of the system the sufferer is particularly exposed to undue influences at the hands, or through the connivance of those who, promising him any relief or palliation of his sufferings, enchant his mind with false hopes, and thus speculate upon his weakness and his gratitude. It is not necessary that the party should be insane, or even that there should be present "unsoundness of mind" to expose him to the acts of the designing, for the sexual organs, when either excited or diseased, are the greatest of all physical disturbers of mental stability. No human being is so strong that he will not in time succumb to persistent disturbances in their functions, and when, as in old age, other sources of physical weakness are super-added, it can be easily perceived why a man struggling in the throes of an emasculating disease, or an impotent salacity, may be reduced mentally to the condition of a credulous child, whom any one may lead or impose upon.

Tumors or abscess, or softening of the brain, with the various forms of effusion which they cause into the cavities of that organ, or the various degrees of pressure to which they subject its substance or its membranes, resulting either in hemiplegia, aphasia, or other forms of localized paralysis, are all very serious obstacles to the freedom and lucidity of mental action. The limits of their direct or remote effects upon bodily functions, mental power, or moral char-

acter, can never be definitely ascertained. It is sufficient to know, however, by scientific demonstration, as well as by the practical testimony of human conduct, that they are a constant hindrance to the executive freedom of brain action, and as constantly disturb that mental poise, without which man can hardly be said to enjoy the unrestricted use of his own faculties. Neither memory nor judgment can accurately respond to calls made upon them for active efforts, when compelled to speak through the medium of deteriorated physical instruments. The brain may indeed be there, but its cords are unstrung and out of tune, and when the mental master touches the key-board, instead of the harmony of reason and the melody of judgment being heard, we have only broken notes and a limping strain.

Aphasia, consequent upon obscure changes in brain substance, with or without preceding apoplexy or paralysis, is a form of lesion seriously compromising not only the faculty of language, but possibly striking deeper still and influencing the association of ideas as well as the memory of words. It is doubtful whether the individual placed in this condition always knows definitely what he wishes to say. He unquestionably thinks he does, but as he fails to express himself accordingly, and we have no means outside of analogy by which to interpret his intended expressions, it becomes a prolific source of error to endeavor to reconstruct his ideas through his utterances. Persons in that state can hardly be said, with either legal or logical propriety, to be *compos mentis*.

All the foregoing diseases, by reason of their direct or remote and translated effects upon the mind, either through the sympathy, or contiguity of suffering organs, because more especially of their concurrent disturbance of the great nervous centers, and chiefly the brain, may, and often do, seriously affect the validity of testamentary dispositions, if not by completely overthrowing the reason at least by greatly exposing the mind to undue influences at a time when it is most incapable of resisting them.

HABITUAL DRUNKENNESS AS AFFECTING TESTAMENTARY
CAPACITY.*

In this day, chronic alcoholism, by its unfortunate frequency, has become a new basis upon which to question mental capacity. The myriad disturbances of the excretory functions which it produces; the subtle changes wrought by it in the nutrition of the brain, now giving rise to structural alterations in the walls of blood-vessels, to the formation of adventitious tissues, to the habitual introduction of a foreign substance into its fluids, and to deposits arising from arrested elimination;—all these effects of chronic alcoholism terminate in a reduction of the mental caliber of the individual. Some fall earlier than others, according to powers of resistance and reaction, for each temperament and constitution appears to have its own poison-line in this particular. But all, sooner or later, yield to the deteriorating influences of habitual indulgence in distilled liquors. Seneca, in his familiar pictures of Roman social life, has given us the portraiture of an habitual drunkard which no modern writer, whether physician or philosopher, has ever been able to improve upon. This is his description of the state of the nervous system in an old sot: “*Nervorum sine sensu jacentium, aut palpitatio sine intermissione vibrantium. Quid capitis vertigines dicam? quid oculorum aurium que tormenta et cerebri aestuantis verminationes.*” (*Epist.* 95, § 16.)

Black as is that picture, let it be remembered that in Seneca's day distillation had not been discovered, and its sublimated educt, the ethereal alcohol, had not yet entered the blood of man as a winged rival in mischief to the slower and largely diluted products of nature's fermentation. But spirituous liquors, in their effects upon human life, character and civil responsibility, occupy too

* As to the original right at common law of an habitual drunkard to make a valid will, see chapter on Habitual Drunkards.

prominent a place in jurisprudence not to be considered as a proper field of inquiry in determining questions of testamentary capacity. And when a state of chronic alcoholism is shown to have become in a testator the law of his daily life, his acts should be scrutinized as those of a being under duress to a fixed moral enslavement. In such a state, affection for kindred, a sense of duty or gratitude toward them; or the capacity to comprehend a moral obligation, may all be blunted to the degree of extinction, together with power to remember, to reason correctly upon the property he possesses, the relations in which it places him toward others, and the consequences attaching themselves to his disposition or non-disposition of it by testament.

It is needless to say that great care should be exercised in scrutinizing the physical and mental condition of testators, as well as their surroundings, and the attendant circumstances under which their wills have been made, and particularly so in the case of habitual drunkards, or of persons who have once been insane. While it is unquestionably true that in many instances the mind, even in advanced age or after protracted illness, exhibits no deterioration in equal measure to that of the body, we must beware how we accept a mere lambent flame of intellectuality for the operations of a self-centered and self-sustaining judgment. The mind, in all stages of human life, requires the aid of its physical instrument, the brain, to translate its ideas into external and articulate utterances. It is upon the integrity of action of this organ that the ability of any individual to think objectively, and to regulate his conduct and the government of his affairs, ultimately depends. Now the brain, as a part of the human body, bears the laboring oar throughout life. More blood passes through it during any given period of time than through any other organ, consequently the least alteration in the quality of that fluid, or the presence of any foreign substance in it, becomes, by reason of its superior sensi-

bility, a matter of physical perception to it. It is, in fact, the great registering ganglion and physical barometer of the animal economy, and its sleepless eye, like that of a faithful watchman, records every passing event, while also compelled to take part in it, either subjectively, as in dreams, or objectively, as in voluntary thoughts relating to external things.

Although the brain was constituted to endure these multifarious labors, experience teaches us that it has its periods of diurnal exhaustion during which it requires that form of rest from voluntary efforts to which the name of sleep is given. But exactly what sleep is no physiology has yet explained. We know how it occurs and why it occurs, but science has not yet mastered the secret of its true nature. We know this much, that the brain has its cyclical laws, independent of those of the body, and that while we wake it has superior power over the body and its functions, and that while we sleep these functions in turn exercise a superior power over it. Therefore, a man's free moral agency depends upon his conscious perception of surrounding circumstances and his power of will to guide his conduct in supremacy over them.

In proportion as any exhaustion of the brain, to whatever cause due, supervenes, the human being perceives less clearly his objective relations to others or to things. He is as one whose window panes becoming covered with a film of moisture are now no longer transparent but only translucent. He still sees the light of day, but cannot clearly distinguish objects so as either to discern their forms or their relations to each other. Although this simile seems to apply more particularly to sight, it applies by analogy with equal force to memory, for sight is as much a mental fact as memory, and while one is used to express ideas of external facts, the other as correctly expresses a similar process applied to past as well as present circum-

stances and objects. The field of the memory embraces all that the mind has ever seen ideally.

Now, after a long wasting illness, or after long and excessive indulgence in alcoholic beverages, the nutrition, and therefore the constitution of the brain substance, is altered. As a consequence of natural waste alone, it will doubtless exhibit a very different form of deterioration than from the habitual presence of a poisonous substance like alcohol interfering with every stage both of constructive and destructive metamorphosis. Structural changes must go on. They are the results of life acting upon a temporary and destructible fabric. But when going on naturally, they are repaired healthfully; when, on the contrary, they are interfered with by blood poisons like alcohol or syphilis, the new tissue formed is not a healthy brain tissue. In other words it is not a natural brain. We have here the starting point therefore for a weakened brain, a weakened mind, and a weakened will.

Another point deserving consideration is the fact that in habitual drunkards the sudden abstraction of the accustomed stimulant, particularly in weakened conditions of body, leaves the brain without that degree of factitious stimulation which has become through habit a *sine qua non* for the performance of any acts requiring the least mental effort. Between the stimulating periods produced by fresh cups, an habitual drunkard is in a state of depression, or proper *dis-ease*. He cannot do his best mentally, because there is no natural force to call upon, and his mental processes and his will are as flaccid as his muscles. Can such a mind intelligently survey the field of varied property—of duty to others and to society, and, more difficult still, can it after long imbrutement respond to the dictates of natural affection toward either offspring or kindred or relatives, or resist the artful trammels of the designing and dishonest seducer who plays upon its weak-

nesses in order to lead it astray? Surely no occasion ever comes when the work of deception can be so successfully accomplished under the mask of friendship and sympathy, as when the mind of an habitual drunkard is worked upon in its waning moments upon earth by a cunning and interested party. It is here, if ever, that courts should scrutinize with the closest vigilance the mental capacity of a testator, and apply those rules of natural equity intended for the protection of the weak and the helpless.

Aside, also, from the permanent mental weakness which results from chronic alcoholism, there are cases of enfeeblement of mind, the consequence of long and wasting sickness, in which the testator is particularly exposed to the snares of undue influence. The natural anxiety of friends to have the dying exhibit proofs of mental activity up to the moment of death, leads attending physicians to make efforts at resuscitating an exhausted brain in their patients by the administration of alcoholic stimulants, or quinine, ammonia, etc.; or, of deadening pain and securing quiet, so as to promote mental rest, by the use of narcotics. Knowing that the party cannot recover, the law of dose and intervals, in the matter of a substance supposed to be tonic alone, is not always prudently observed. The aim is to keep the patient bright and mentally active while he lives, and this course is frequently pursued for weeks.

These stimulants, whose secondary result is one of depression tantamount to narcotism, when they act upon an already weakened brain induce a spurious lighting up of the mind which is more properly a vertigo or slight delirium than a normal intellectual resuscitation. In such a condition the mirror of the memory is still covered with a haze through which may dart at times, under the spur of stimulants, a ray of perception. But no correct appreciation of the relations of facts to present or future results, such as is necessary to form a judgment as to their consequences upon persons in interest, is to be looked for. The person

then merely grasps at ideas, while bewildered by the rapidity with which they are whirled through his mind under the spur of stimulants and the febrile activity of a partially congested brain. Is such a person *compos mentis*?

In *Stedham's Heirs v. Stedham's Ex'r* 32 Ala. 525), it was held that mental incapacity on the part of a testator, though produced by the use of medicines, is sufficient to invalidate a will. In that case it was shown that the testatrix, Mary A. Stedham, at the time of executing her supposed will was, and had been, for eight or ten days previous thereto, under the influence of morphine, and from the effects thereof, was incapable of any act requiring judgment and deliberate intention.

Can there be any doubt that the wills of persons laboring under great bodily and mental weakness and made within a few days of their death, although exhibiting no visible signs of that weakness may yet often have been the offspring of undue influence acting upon a mind unbalanced by drugs? And if so, it seems eminently proper that the burthen of proof should fall upon the proponents to show that the instrument was in every sense the act of a free moral agent, capable of appreciating the nature and consequences of the testamentary dispositions made by him, and intending them as the expression of his last will.

The proof of drunkenness amounting to insanity will necessarily invalidate a will. But if it be shown that the testator was not an habitual drunkard, or under the influence of strong liquors at the time of its execution, the presumption will be in favor of the will, a presumption strengthened or impaired by the internal evidence of its contents. *Handley v. Stacy*, 1 F. & F. 574. In a leading case in England, that of *Ayrey v. Hill* (2 Add. 206), Sir JOHN NICOLL, speaking to this point, said: "The testator's case appears to the court to be that of a person, not properly insane, or deranged, but to be that of a person addicted to a species of ebriety which, during its subsistence, frequently

produces, and is proved in the present instance to have actually produced upon the subject of it, effects very similar to those which insanity or mental derangement would have produced. In other words the deceased appears to the court, not in the light of a madman, but in that of a person habitually addicted to the use of spirituous liquors, under the actual excitement of which he talked and acted in most respects very like a madman.

“Now viewed as with reference to the point at issue, the cases in question notwithstanding their apparent similarity, are subject in my judgment to very different considerations. When actual (proper) insanity is proved to have once shown itself, either perfect recovery, or at least a lucid interval at the time of making must be proved, to entitle any alleged testamentary instrument to be pronounced for as a valid will. Either of these, however, the last especially, is highly difficult to prove for the following reasons: Insanity will often exist, though latent, so that a person may in effect be completely mad or insane, however, on some subjects, and in some parts of his conduct apparently rational. But the effects of drunkenness or ebriety only subsist while the cause, the excitement, visibly lasts. There can scarcely be such a thing as latent ebriety, so that the case of a person in a state of incapacity from mere drunkenness, and yet capable, to all outward appearances, can hardly be supposed. Consequently, in the last, which, in my judgment, is this description of case, all which is required to be shown is the absence of excitement at the time of the act done, at least the absence of the excitement in any such degree as would vitiate the act; for I suppose it will readily be conceded that under a mere slight degree of that excitement the memory and understanding may be in substance as correct as in the total absence of any exciting cause. Whether, when the excitement in some degree is proved to have actually subsisted at the time of the act done, it did, or did not subsist in the requisite de-

gree to vitiate the act done, must depend in each case upon due consideration of all the circumstances of that case in particular, it belonging to a description of cases that admits of no more definite rule applicable to the determination of them than the one I have suggested, that I am aware of." (See, also, *Billinghurst v. Vickers*, 1 *Phillim.* 191; *Wheeler v. Alderson*, 3 *Hagg.* 574; *Hight v. Wilson*, 1 *Dall.* 94; *Gardiner v. Gardiner*, 22 *Wend.* 526; *Peck v. Carey*, 27 *N. Y.* 9.)

It will be observed in the above decision of Sir JOHN NICOLL, that he asserts with great assurance that "there can scarcely be such a thing as latent ebriety." While it cannot be necessary in this connection to dispute the question whether a man without drinking can get drunk, it is still to be remembered that it is not with the drunkenness itself, as such, so much as with its effects, whether latent or patent upon mental capacity that the law concerns itself. Now these effects do not wholly disappear with the outward and visible signs of intoxication. And in an habitual drunkard in proportion to age, and physical consequences of drunkenness, there will be latent deterioration of mental capacity and moral freedom. It only needs to apply strain to give patent evidence of latent weakness. Strange as it may seem it is nevertheless true, that an habitual drunkard by sudden abstinence, may have less command over his mental faculties in both directions of intensity of thought and extensity of perception than he would have if moderately excited by drink, although that amount of drink if indulged in by a temperate drinker would render him thoroughly drunk, and *non compos* for the time being.

Our law has indeed said that all men with the capacity to make wills may do so, not that only men of a certain degree of that capacity may do so. Therefore, between the minimum and maximum degrees of mental capacity to make a will, all men may exercise that

privilege. But if there be a standard which must be reached at the outset as a *sine qua non*, there must be a territorial limitation also, outside of which whoever falls loses the privilege. In the case of the drunkard he is habitually falling below the standard, hence all presumptions of fact are against his mental capacity, and proof is consequently required to rebut such presumptions, whenever an act is done by him demanding the mental capacity established by law. In the *Matter of Tracy* (1 Paige, 582), Chancellor WALWORTH, speaking to this point of presumptions of mental incapacity in habitual drunkards, observed as follows: "It is supposed by many that the prosecutor in such cases is bound to prove affirmatively that an habitual drunkard is incapable of managing his own affairs. On the contrary, the fact that a person is for any considerable part of the time intoxicated to such a degree as to deprive him of his ordinary reasoning faculties, is *prima facie* evidence at least that he is incapacitated to have the control and management of his property." (Vide also, *Ludwick v. Comm.*, 18 Penn. 172.)

LUCID INTERVALS.

Experience shows that insanity does not equally obscure the mind at all times; that it is subject to remissions during which the capacity to perform rational acts is restored, and nothing in the relations which the person bears to that act sounds to folly. Knowledge of these facts has given rise to the necessity of recognizing such a condition of mental clearness as possible among the insane and of designating it as a lucid interval. Indeed, the original meaning of the word "lunatic" was derived from the assumed influence of the moon over such persons at distinct intervals; they were supposed to be moonstruck, and both COKE and HALE speak of the lunatic as one *qui gaudet lucidis intervallis*. (*Beverley's case*, 4 Co. 123; 1 Hale's P. C. 32; 3, Atk. 174.) The lunar origin of insanity was a prevailing

belief anciently among all nations, and the term "lunatic" has cognates in almost every language. (*DuCange's Glossary, tit. Lunaticus; Burrill's Law Glossary, ad verb.*) And since observation is the mother of experience and experience of law, it is not surprising to find that the doctrine of lucid intervals and their restoring effects upon testamentary capacity was fully recognized by the Roman law. Thus it is declared that "if a madman make a testament during a lucid interval, his testament is valid." (*Institutes, Lib. 2, Tit. 12, § 1.*)

As will naturally be inferred, there has been a vast amount of discussion in the books as to what constitutes a lucid interval. And in the conflicts of theory which have ensued, it has often happened that, in trying to refine the definition over much, the original significance of the term, in its plenary legal application, has been lost to view. Nor will this be wondered at when it is remembered that this is a point of theoretical divergence between the sciences of law and medicine. In proportion, therefore, as one system of belief has prevailed in the decisions of courts, will it be found that they have followed in or strayed from the original intention of the doctrine at law. For this intention being always to favor testamentary capacity, a lucid interval was meant to express a return of the capacity to do a rational act in a rational way, in one who had previously lost it. While in medicine a lucid interval means simply a remission in the intensity of the mental obscuration, but not a return to sanity, all acts then done being still the acts of a disordered mind.

"In cases of permanent, proper insanity," said Sir JOHN NICOLL, "the proof of a lucid interval is matter of extreme difficulty, as the court has often had occasion to observe, and for this, among other reasons, namely, that the patient so affected is not, unfrequently rational to all outward appearance, without any real abatement of his malady; so that, in truth, and substance, he is just as insane, in his ap-

parently rational, as he is in his visible raving fits." (*Brogden v. Brown*, 2 *Add.* 445; Vide, also, *Ld. BROUGHAM's Dictum*, in *Waring v. Ib.*, 6 *Moore's P. C.* 349.)

But since the law must deal with facts, as observed, and not as inferred, it cannot enter into refinements of physiological classification; it cannot establish metes and bounds in a land of shadows, nor employ any other standard of judgment than that derived from common experience. Hence, for all practical purposes, a person, whatever may be, or may have been his condition of mind, who can comprehend and execute a rational act in a rational way, is legally *compos mentis*.

Lord Chancellor THURLOW, in attempting to define what constitutes a lucid interval, fell into a practical self contradiction, by asserting it to be "an *interval* in which the mind having *thrown off* the disease had *recovered* its general habit." (*Att'y-Gen'l v. Parnter*, 3 *Brown's Ch. C.* 444.) Necessarily an interval in disease cannot co-exist with recovery. If the disease has departed there is no room left for an interval. Chancellor D'AGNESSEAU in his argument on the testamentary capacity of the Abbé D'Orléans, was more correct when he spoke of a lucid interval as a "*kind* of temporary cure, an *intermission* so clearly marked, as *in every respect* to resemble the restoration of health." (*Evans Pothier on Oblig., Appendix*, p. 579.) TAYLOR only defines it by an alternative proposition saying, that "by a lucid interval we are to understand a temporary *cessation* of insanity, or a perfect restoration to reason." (*Med. Jur.* 165.) But, for the same reasons stated above, a perfect restoration to reason is a cessation of the insanity and not an interval. Insanity is not an entity, it is a diathetic condition of body radiating its influences with more or less intensity upon the mind. Hence, all that can be claimed for a lucid interval at law is, that it is a return by an insane person to a condition of appreciation of the true nature and consequences of his acts, together with capacity

to regulate his conduct correctly as toward them. Neither the length of the lucid interval, nor the degree to which it has extended itself in other directions adds any value to the quality of the testamentary acts performed during its existence. Nor, again, if they are rational acts, does it matter that the testator was not restored to his previous strength of mind. It is sufficient that he was able to perform them correctly and without restraint, and with evident knowledge of what he was doing. (*Ex parte Holyland*, 11 *Vesey*, 10.)

A general review of the authorities both in England and this State will show that a lucid interval implies the latent persistence of the insanity, while only an apparent restoration to reason is present, exhibiting itself through a degree of mental capacity equal to the necessities of the occasion. This is the true legal import of the term.

In *Gombault v. The Public Administrator* (4 *Bradf.* 226), the court in examining the question of a lucid interval, said, "among the most mysterious of the phenomena of the human mind, is the variation of the power and orderly action of the faculties under different circumstances and conditions and at different times, and especially mysterious is the oscillation from insanity to sanity, the rational power often fluctuating to and fro, until reason ultimately settles down firmly upon her throne, or falls, never again to resume her place in this life. Without speculating upon this interesting theme, it is sufficient to say that the law recognizes the fact established by experience, and does not hesitate to ratify the validity of a transaction performed in a lucid interval; though it is exacting in its demands and scrutinizing in its judgment of facts adduced to exhibit and demonstrate intelligent action at the time of the event under investigation." "It is also worthy of remark, that a lucid interval is more easily established in cases of delirium, or fluctuations arising from temporary excitement,

or from periodicity in the attacks of the disease, than in cases of habitual insanity."

No comment is necessary upon the above decision, which still remains the leading one in our Reports upon the subject which it discusses.

LEGAL CONSEQUENCES OF LUCID INTERVALS.

Acts done during lucid intervals are binding upon their authors. Thus deeds, or contracts, or wills, although made by lunatics, become valid the moment it can be shown that they were executed during a lucid interval. But no lucid interval is ever presumed, and it is incumbent upon the parties claiming under such instruments to prove that they were executed during such a state of mind. The acts or instruments alone are not sufficient evidence of this state, which must be proved *aliunde*. (*Shelford on Lun.*, p. 340; *Hix v. Whittemore*, 4 *Metc.* 545; *Haden v. Hayes*, 9 *Penn.* 151; *Gangevere's Estate*, 14 *Ib.* 417; *Gombault v. Pub. Adm'r*, 4 *Bradf.* 226; *Creagh v. Blood*, 2 *Jones & Lat.* 520; *Jackson v. VanDusen*, 5 *Johns.* 144; *Bannatyne v. Ib.*, 16 *Jur.* 864; *Townsend v. Ib.*, 9 *Gill.* 10; *Harrison v. Rowan*, 3 *Wash. C. C.* 580; *Whitenack v. Stryker*, 1 *Green's Ch.* 8; *Stevens v. Van Cleve*, 4 *Wash. C. C.* 262; *Halley v. Webster*, 2 *Me.* 461; *Boyd v. Eby*, 8 *Watts*, 66; *Duffield v. Robeson*, 2 *Harr.* 375.) Even though a party be confined in a lunatic asylum, he may yet perform a valid act at law, if done in a lucid interval. (5 *Dow. Pr. C.* 236.)

And upon any allegation being made that a particular deed or contract was executed during a lucid interval, the court will direct an issue to try it. (*Att'y-Gen. v. Parnther*, 3 *Br. Ch.* 441; *Hall v. Warren*, 9 *Ves.* 605; *Clerk v. Richards*, 2 *Vern.* 412.)

EFFECT OF AN INQUISITION OVER-REACHING THE WILL.

The verdict of a jury finding the supposed testator *non compos mentis* for a period covering the date of the will

under a commission of lunacy, is strong, but by no means conclusive evidence of his incapacity at the time of executing it. Unsupported by any patent absurdity on its face, and opposed by contradictory evidence of sanity, such evidence has sometimes been overcome. Hence, "where clear and decisive insanity has been established at a prior time, acts of a doubtful character are of more force in proof of its existence at the time in question; even subsequent insane acts may reflect back upon acts otherwise equivocal, but when no decided acts prior to, or subsequent, are proved, equivocal acts, however numerous, will not establish insanity." (Sir JOHN NICOLL, in *Wheeler v. Batsford*, 3 *Hagg.* 599; *Stock*, p. 48.) But, small circumstances corroborating the finding of insanity, by a jury, such as acts of extravagance committed by the testator, have been held to complete the evidence of incapacity. Such circumstances become valuable indicia when used retrospectively, because they throw light upon the habits of mind and moral perceptions of the testator. (*Roberts' Law of Wills*, p. 32; *Stock*, p. 48; See, also, "*Inquest of Office and its effects*" ante.)

TESTIMONIAL CAPACITY OF LUNATICS.

At common law a lunatic being considered as one civilly dead, was deemed incompetent to testify; and a witness who has attested an instrument and afterward become insane will be considered as dead during his incapacity, and proof of his handwriting to the attestation will be admissible. (*Bernett v. Taylor*, 9 *Ves.* 381; *Co. Litt.* 6 [b.] *Com. Dig.*, *Testmoinne A.* [1]; *Currie v. Child*, 3 *Camp. N.* 283; *Adams v. Kerr*, 1 *Bos. & Pull.* 360; 1 *Gr'lf's Evid.*, § 365.) In *Rex v. Eriswell* (3 *Term Rep.* 707) in which the question was as to the settlement of a pauper, the witness was insane at the time of the second inquiry, and had been so for about fourteen years, and BUTLER, J., said, "I consider the witness as dead, he being in such a state as renders it

impossible to examine him." Similar cases often happen in this State, where a demented lunatic is found wandering at large, who can give no information as to his last place of settlement.

It is immaterial what may be the form which the defect of understanding assumes, whether idiocy, imbecility or mania. In either case, while the mental obscuration exists the party is deemed incompetent to testify. But, as soon as cured, or should a lucid interval supervene, the competency is restored. (*Evans v. Hettich*, 7 *Wheat.* 453, 470; *White's case*, 2 *Leach's C.C.*, 482; *Tait on Evid.*, pp. 342-3.)

Looking at the condition of the mental faculties during the prevalence of insanity, the disturbance of their equipoise, the emotional excitability present, and the underlying *raptus maniacus* touching every faculty at some point; remembering, also, that every human being is steeped in his own temperament, wears the livery of his ordinary mental states, and exhibits in his unguarded acts the complexion of his predominant moral feelings, we are forced to the conclusion that, even outside of the sphere of delirium and incoherence, the statements of one who is insane or has been profoundly so, but is now recovered, need to be scrutinized from a standpoint not so much of veracity as of intellectual competency.

Hence it is that courts have always looked with distrust upon the testimony of the insane, because of its generally misleading character. Nor will this appear surprising when we recall the disturbing influences produced by insanity upon the moral, as well as the mental faculties. From the earliest of our decisions touching the competency of such evidence (*Livingston v. Kiersted*, 10 *Johns.* 362, *A. D.* 1813; *Hartford v. Palmer*, 16 *Ib.* 143, *A. D.* 1819), down to the present day, this form of proof has never been considered *prima facie* wherever any other relating to the same series of facts could be obtained. The reasons for this are aptly set forth in the case of *Holcomb v. Holcomb* (28

Conn. 181, *A. D.* 1859), where the court, commenting upon the value of such testimony, said :

“The inlets to the understanding may be perfect, so far as any human eye can discern ; the moral qualities may all be healthy and active ; the conscience may be sensitive and vigilant, and the memory may be able to perform its office faithfully, and yet, under the influence of morbid delusions, reason becomes dethroned, false impressions from surrounding objects are received, and the mind becomes an unsafe depository of facts. * * * * *

The force of all human testimony depends as much upon the ability of the witness to observe the facts correctly, as upon the disposition to describe them honestly ; and if the mind of the witness is in such a condition that it cannot accurately observe passing events, and if erroneous impressions are thereby made upon the tablet of the memory, his story will make but a feeble impression upon the hearer, though it be told with the greatest apparent sincerity.”

In 1851 a case arose in England which required a relaxation of the common-law doctrine, excluding the testimony of the insane. There, a patient in a lunatic asylum was so grievously assaulted by an attendant named Hill, that he died of his injuries. Hill was thereupon indicted for murder, and a lunatic named Donnelly, who was one of the witnesses to the assault, was, after examination by the court as to his competency, allowed to testify. Exceptions being taken to this on a case reserved, the judges were all of opinion that no error had been committed, it being held that the admissibility of such evidence was to be left to the discretion of the court, since there was no unvarying principle by which to govern such cases. (*Regina v. Hill*, 2 *Denis. C. C.* 254, *A. D.* 1851 ; 3 *Dowl. Pract. Cases*, 161 ; *Temple & Mew*, 582 ; *Kendall v. May*, 10 *Allen*, 59 ; 1 *Whart. Cr. L.* 752.) In this case Donnelly being the most intelligent witness to the assault no better testimony could be adduced, and the facts testified to not re-

lating to himself, no motive for misstatement or exaggeration could reasonably be imputed to him. Whether he would have been deemed a competent witness in his own case is a matter upon which the court did not express any opinion.

Except in the case above cited, there seems to be no instance where a lunatic, not in a lucid interval, was admitted to testify before a court. In the only instance which approximates to it, viz. : (*Ex parte*, 3 *Dowl. Pr. Cas.* 161), a party applied for a habeas corpus to bring up a person, who was confined in a lunatic asylum, for the purpose of producing him as a witness. The affidavit stated that he was *rational*. The court held that the writ could be granted if the party was in a fit state to be removed, and was not a dangerous lunatic. Both these cases, however, go to the extent only of showing that where no better testimony than that of a lunatic exists, it is competent to offer him as a witness, leaving the court to decide upon his admissibility. But the common-law doctrine remains, nevertheless, unchanged wherever it can be applied without hindrance to justice.

The creation of public lunatic asylums as among the most beneficent charities of modern times, and the immuring within them of hundreds of patients of different grades of mental incompetency, renders it necessary, as a matter of protection to them, to relax the severity of the common law rule disfranchising the insane as a class. It would at times work great injustice and practically abrogate the rule of law that the best evidence of which the case admits (and the only evidence in fact in the case of wrongs committed upon lunatics in asylums) must be produced, if that evidence were deemed incompetent at the start. Yet this is still the rule in New York where, in a recent case, it was held that an inquisition of lunacy found against a witness, is *prima facie* evidence of his incompetency to testify. And this is so, although his testimony is offered

against one who was not a party to the proceedings in lunacy. (*Wolcott v. Adees*, 3 *Lans.* 173.)

Taking into view the thousands of lunatics in the custody of asylums, and the large number of discharged patients from these institutions, now restored to active life, but in whom delusions on this or that subject may still linger, it becomes a most important point in the law of evidence to determine whether the presence of a delusion, having no relation to the matter in issue, should in itself be regarded as such manifest insanity as to exclude the party subject to such delusion from testifying. Lord CAMPBELL in *Regina v. Hill* (2 *Den. C. C.* 254), speaking to this point, said "it has been argued that any particular delusion, commonly called monomania, makes a man inadmissible. This would be extremely inconvenient in many cases, in the proof either of guilt or innocence; it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the judge must in all cases determine the competency and the jury the credibility. Before he is sworn the insane person may be cross-examined and witnesses called to prove circumstances which might show him to be inadmissible, but in the absence of such proof he is *prima facie* admissible, and the jury must attach what weight they think fit to his testimony."

It has been the practice of some courts to make this inquiry as a condition precedent to the admissibility of the witness. It was so done in *Regina v. Hill*, above cited; it was re-affirmed in *Spittle v. Walton* (40 *L. J. Chancery*, 368); and again in an Alabama court, in *Campbell v. The State* (23 *Ala.* 44), where Chief Justice CHILTON said the question was, whether the witness, conceding him to have labored under mental delusion at a previous period, was, at the time of the trial, of sound mind.

It would seem, therefore, that the time has arrived when more latitude should be given to the testimony of the

insane, in obedience to the general enlargements of the limits of testimonial evidence which is everywhere occurring. It would be found that because a person may be insane enough to justify a finding of lunacy, or to need treatment in an asylum, does not necessarily prove him to be incapable of appreciating either the nature or sanction of an oath, or of correctly stating facts derived by him. Thus in *Matchin v. Matchin* (6 Barr. 332) which was on a libel for adultery proved to have been committed by an insane wife, it was held that her confession of the fact was competent evidence of it against her, but only when corroborated by circumstances and free from suspicion of collusion. (*Mordaunt v. Mordaunt*, 39 L. J. Prob. & Mat. 57.) But they must be *facts*, capable of circumstantial corroboration, as distinguished from *incidents*, which may be simply personal and subjective, having no other basis than in the imagination of the witness. Under these limitations it may be said :

1st. That an insane person should not *ipso facto* be deemed incompetent to testify, where the court is otherwise satisfied with the degree of his understanding and his knowledge of the nature and sanctions of an oath. An insane person may, therefore, be a competent witness; and a person who has been insane and is apparently recovered, should be permitted to testify to facts occurring during the period of his insanity, provided that, in all cases, the facts testified to are objectively demonstrable and constitute a basis from which to begin such testimony.

2nd. But a personal and self-regarding incident occurring during a period of insanity, and testified to by its subject either while still insane, or when recovered from that state, should not be treated *per se* as an evidential fact, and its probative force should be made to rest upon corroborating circumstances.

* See *People ex rel. Norton v. Governors of the New-York Hospital*, reported in *Am. Jour. of Insanity* for Jan., 1877, Vol. 33; 3 *Abbott's N. C.* 285.

CHAPTER NINTH.

CRIMINAL RESPONSIBILITY OF THE INSANE.

The presumption that all men are sane, and that every rational being knows and intends the natural, necessary and probable consequences of his own acts, are fictions of law essential to the maintenance of government. Although but fictions, perpetually contradicted by illustrations of mental infirmity in every sphere of life, they nevertheless form the only basis upon which jurisprudence can formulate a code of either positive or ethical obligation. They must be retained, therefore, because they are in the main true; because, in fact, they express the law of nature in its original tendency, which is toward health, and from which, both sin in the moral, and disease in the physical world constitute a departure. Under these circumstances at common law, every human being is presumably rational and presumably responsible for all his acts. (1 *Gr'lf. Evid.*, § 42; 1 *Hale's P. C.* 30; *Att'y-Gen. v. Parnther*, 3 *Bro. Ch. Ca.* 443; *Peaslee v. Robbins*, 3 *Metc.* 164; *Shelford on Lunatics*, 275; 1 *Collinson on Lun.* 55; *People v. Kirby*, 2 *Parker's Cr.* 28.) So strongly is this doctrine engrafted upon the common law, that for criminal purposes it is not sufficient that a prisoner have been previously found idiot or lunatic, or the contrary by inquisition in chancery, because he may be only partially insane, and so still responsible for his acts. (1 *Hale's P. C.* 32.) So, too, it has been held that the question of insanity cannot be considered by a Grand Jury, and if they find that

the accused committed acts which would be murder in a person of sound mind, it is their duty to find a bill. (*Regina v. Hodges*, 8 Carr. & P. 195; *U. S. v. Lawrence*, 4 Cranch's C. C. 514.) The presumption of sanity is the necessary basis of responsibility and the sole foundation upon which society rests, or can rest its right to punish, by personally afflictive penalties, the violator of its laws. And it goes even beyond this in affixing civil damages in the form of monetary penalties to the acts of all men, whether sane or insane, whenever those acts are productive of harm to the persons or property of others. It is the doctrine of the common, as it is of the moral law, that he who does harm must atone for it in some way.

Despite, however, all formulas of positive law, the fact remains, as experience daily shows, that all men are not sane, and as a necessary corollary that they do not always know the nature or effects of their own acts, and cannot in consequence be said to intend the results which flow from them.

Recognizing this as a special chapter in the law of nature, to be provided for by legislation, our (N. Y.) Statute accordingly recites that, "No act done by a person in a state of insanity can be punished as an offense; and no insane person can be tried, sentenced to any punishment, or punished for any crime or offense, while he continues in that state." (*R. S., Pt. 4, Ch. 1, Tit. 7, § 2.*) What constitutes insanity, therefore, at law, and what constitutes punishment as addressed to the repression of crime, become subjects of legitimate inquiry when discussing the criminal status of the insane. As the statute could not go farther and define the degree of insanity necessary to exonerate a party from criminal responsibility in every given case, because it could give no test of mental unsoundness which would be universal in its application, it follows that courts must, in each case, leave a question of insanity to be decided like any other matter of fact in

issue. Nothing more strikingly marks the great progress recently made in the jurisprudence of insanity than the increasing disavowal of it as a question of law, and its consequent treatment as a question of fact. (*Boardman v. Woodman*, 47 *N. H.* 140; *State v. Pike*, 49 *Ib.* 399; *State v. Jones*, 50 *Ib.* 369.) Even in England the impossibility of satisfactorily treating the question of insanity as a question of law, has been long ago admitted, and Sir HERBERT JENNER FUST, in *Mudway v. Croft*, said very pertinently, "Now it has frequently been attempted to furnish some general rules which might serve as guides to courts of law in the investigation and decision of cases of this description; but all endeavors to do so have failed; every case has some distinguishing feature; each case must be governed by its own peculiar circumstances." (7 *Curties' Ecc. R.* 547.)

"Jurists," says Dr. RAY, "who have been so anxious to obtain some definition of insanity which shall furnish a rule for the determination of responsibility, should understand that such a wish is chimerical from the very nature of things. Insanity is a disease, and as is the case with all other diseases, the fact of its existence is never established by a single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case." (*Med. Juris. of Ins.*, p. 39, § 24.) And the trenchant remarks of Judge DOE, in *State v. Pike* (49 *N. H.* 399), may very fittingly be cited here in further illustration of this point. "If," as he says, "the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness and showing himself qualified to testify as an expert." The soundness of this argument cannot be questioned, while in logic it is a true *reductio ad absurdum*.

It must be evident to all that since insanity is confes-

sedly a question of fact, a physical condition with mental co-efficients whose value is changeable, and whose weight, as proofs, is the resultant of averages struck by competent observers—it must be evident that insanity at law can have no more limitations put upon its meaning than the recorded history of its phenomena will justify. Therefore, it must be viewed as any other condition of life, discovered by experience, which summarizes in itself a number of distinct facts without value disjunctively, yet forming by conjunction a typical class. In issues involving questions of testamentary capacity, subscribing witnesses are admitted to testify to conditions of mind which they would not be held competent to give opinions upon in other cases. The rule which admits such testimony in civil cases and yet excludes it in criminal ones, seems to have no foundation in reason upon which to rest, and it has been condemned as groundless and absurd. (*Boardman v. Woodman*, 47 N. H. 145.)

Although municipal law cannot deal with medical theories of insanity as matters cognizable within its jurisdiction, justice, in weighing either civil or criminal responsibility, must weigh the effects of mental infirmity upon human conduct, even where it cannot trace the direct influence of that infirmity upon the act under examination. Character and conduct are both so cumulative, that the individual unit which may have stamped the type of a class upon it, cannot always be found lying proximate to the act by which we seek to judge the actor. The maxim *de non apparentibus et non existentibus* cannot safely be applied in admeasuring the basic elements of human conduct. Some larger conceptions of the infinity of remote causes among which we live and move and have our being, and by which in turn we are governed, are necessary, in order to weigh justly the character of a human action. And yet, some attempt must be made to put limits upon the possible abuse of the plea of insanity, by requiring that it

shall be offered in good faith and upon a basis of substantial proofs, to be interpreted like any other question of fact. This attempt has been made by our courts, in close imitation of those of England. Hence, the statute, speaking of insanity in general, as a sufficient answer to an indictment, is immediately met by decisions of our courts showing that degrees in insanity must be considered, that those partially insane may still be responsible, and that the true interpretation of the legal import of the word "insanity" is *non compos* as to the *particular* act itself, and not whether the party is proved to be wholly insane, whatever that may be understood to mean. (*Clark's case*, 1 *City Hall Rec.* 176; *Ball's case*, 2 *Ib.* 85; *People v. Kleim*, 1 *Edm.* 13, 26; *People v. Divine*, *Ib.* 594; *People v. McFarland*, 8 *Abb. Pr. N. S.* 57.)

Doubtless, since the mind is not constructed in compartments, but is unitary in character, the idea of any thing like a psychical partial insanity becomes paradoxical. Lord BROUGHAM fully recognized this doctrine in the case of *Waring v. Waring* (6 *Moore's P. C.* 349), when he said: "We are wrong in speaking of partial unsoundness; we are less incorrect in speaking of occasional unsoundness; we should say that unsoundness always exists, but it requires a reference to the peculiar topic, else it lurks and appears not. But the malady is there, and as the mind is one and the same, it is really diseased, while apparently sound, and really its acts, whatever appearances they may put on, are only the acts of a morbid or unsound mind." This was in a case involving testamentary capacity, and the ground there taken, that partial insanity in itself would disqualify a testator, has never been received with favor here. But in relation to responsibility for crime, there has always been but one doctrine in England. From the days of Hale to the present time, it has been held that partial insanity is not *per se* a good defense to an indictment, and this doctrine, after undergoing the fullest review by all the Judges in the

House of Lords, was re-affirmed in *McNaughton's Case* (10 *C. L. Fin.* 200); and in the United States was subsequently approved in *Comm. v. Rogers* (7 *Metc.* 500)

It will always be extremely difficult, however, from the very nature of the subject itself, to apportion, in the case of the insane, the measure of responsibility attaching itself to acts of alleged crime committed by them. And so long as the term "insanity" shall be used as a word of multiple signification, conveying no definite idea of the limits within which it should be legally applied, there will be conflicts of opinion as to the responsibility of a given individual, confessedly insane, under one standard of judgment; and yet confessedly responsible under another. A good illustration of this legal paradox was given in the case of the *People v. Montgomery* (13 *Abb. Pr. [N. S.]* 222), where SMITH, P. J., in charging the jury, said: "Insanity is a kind of generic word, and includes various degrees of diseases of the mind. There are degrees of insanity, in some of which there is no mind left. In other degrees there are lucid intervals. There are persons who are afflicted with dementia, which, as I understand the testimony of the physicians, is a gradual impairment or enfeeblement of the mind. If that is what they mean, and such I understand to be the view of Drs. Gray and Moore, it is for you to say whether that degree of insanity had so far progressed with the defendant as to deprive him of the knowledge of the quality of his act." And subsequently, on *certiorari* of the same case at the General Term, MULLIN, P. J., said: "While I am of the opinion that, for some days before the killing, the prisoner was partially insane, and at some times during that time *more so* than at others, there is no evidence that he was not capable of distinguishing right from wrong at any time between noon on Saturday and the commission of the crime. Indeed, we might go further, and say that at no time, except when he was in one of the epileptic fits, is it proved that he was incapable of distinguishing right from wrong."

The foregoing opinions, which are leading ones in our criminal jurisprudence, and have never been reversed, present some very striking proofs of the difficulty, if not impossibility of discussing such a subject as insanity from a purely legal stand-point, when, being a question of fact, it must always require for its elucidation an omnipresent knowledge of the relative value of each constituent that goes to make up its history. Thus, in Justice SMITH's charge to the jury, he uses the term "dementia" as though synonymous with partial insanity, whereas, in fact, it expresses a general exhaustion of the mental faculties *consequent* upon the preceding excitement of a state of established insanity. Dementia is sometimes, on this account, called the tomb of the human reason. It is more correctly represented by the analogy of sleep occurring in a body exhausted by exercise. In fact, it is a form of quasi-sleep of the mind, through which all maniacs pass, some to recovery, some into fatuity. But it is in no sense partial insanity, for, while it lasts, its horizon is, on the contrary, all-embracing.

In the same way, Justice MULLIN, admitting that the prisoner Montgomery was partially insane, says that he was "sometimes more so than at others." How much more than partially insane a man can be without becoming wholly insane, he does not attempt to determine. But certainly, as a logical consequence, if a man partially insane be responsible, then a man who is admitted to be more than partially insane should not be judged by the same standard. What is needed in such cases, is to take the average degree of mental disorder present as computable from observations covering long periods of time, and then determine whether there was at the date of committing the act such knowledge of its quality and such power of self control, as are necessary to constitute in the eye of the law an intelligent, free moral agent. When a man is admitted to be partially insane, all presumptions should be against his capacity to regulate his conduct as sane men do theirs. And

every doubt should be construed in his behalf, because he cannot be considered any longer as a free moral agent. Nothing, therefore, is more conspicuously a failure than the attempt to draw lines of responsibility in a field of mental aberration as obscure as that lying between partial and total insanity. "It would be a safer rule for courts of law," says a writer in the *Edinburgh Law Journal* (*Vol. 1, p. 542*), to direct their attention to the proof generally of diseased manifestations of the intellect and feelings; and when these are undoubted to presume irresponsibility, because the contrary cannot be made sure of, and the balance of probability is greatly on the side of irresponsibility."

Unquestionably when partial insanity is admitted to be present in an individual charged with crime, it is as necessary to scrutinize the degree of the insanity as it is the fact of the insanity. The term being a variable one even with experts, a man might be shown to be partially insane, who yet talked and acted rationally, and in whom, therefore, none of the ordinary objective symptoms of insanity could be legally proved to exist. "If," said Justice MULLIN, "in the case before cited, courts are to act upon this as an established fact, I do not see but that all attempts to punish such persons must be given up. If a man may be utterly insane and yet talk and act rationally, it is impossible by any test to determine where responsibility for crime attaches. We may convict a person altogether incapable of committing crime."

It is evident from the foregoing statement that but for the question of punishment when confronted by the plea of insanity, courts would experience no difficulty in dealing with criminals alleged to be insane. And since, as all experience of the insane shows, there are gradations in insanity as there are variations in sanity, while in both the point in which they blend and the line which separates them cannot be positively marked, it follows that there may be persons habitually dwelling in this border land

who, from repeatedly crossing the boundary and changing their physical habitations, may be said to become citizens of both territories. Sir JOHN NICOLL speaking to this point in *Dew v. Clark* (3 *Add.* 79) said: "But, if it be meant and intended that the law of England never deems a party both sane and insane at different times upon the same subject, and both sane and insane at the same time upon different subjects, there can scarcely be a position more destitute of legal foundation." Under this principle, therefore, where such a party is charged with crime, it becomes, according to our present authorities, extremely difficult to conduct his trial under a jurisdiction whose penalties are framed alone for the reformation and intimidation of sane minds. That an insane man is not necessarily insensible to the fear of punishment—that some forms of insanity are so largely accompanied by perversions of the moral affections alone and so little burthened with bodily diseases requiring material medication as to present no visible symptoms of any bodily suffering or ailment, are facts well known to others beside physicians.

Now, there has gone out with the idea of insanity, as a bodily disease, an idea of physical pain and discomfort which stamps all association of punishment with it as a barbarous and inhuman idea not to be entertained in a christian jurisprudence. But if the only punishment which a civilized community can justly inflict upon a wrong-doer be reformatory and not vindictive, then it can be easily shown that there are forms and degrees of insanity whether called moral or otherwise, exhibiting themselves predominantly through ineradicable depravity of the passions, and an insensibility to the terrors of punishment or the rebukes of conscience, in which appropriate moral discipline, backed by physical force, when indispensable, may be of greater benefit to the patient than either medicines, or an otiose seclusion. Says Prof. WHARTON in this connection: "We may, therefore, afford to meet the advo-

cates of 'moral insanity' on their own ground, and assume with them that there are cases in which there is no moral sense or conscience, and in which the individual so constituted is left to the control of his appetites and passions alone. And if so, these are cases where a moral sense or conscience is to be created by the state. To except those whose moral sense is perverted or extinct, is to except the very class for whose benefit, as well as for the safety of the community, the law is required." (*Med. Jur.*, Vol. 1, § 189.) "The recent North German Code," says this same author, "has endeavored to solve the difficulty by establishing in such cases what is called *diminished* responsibility, followed in cases of conviction, by penalties graduated on a milder scale than those which are visited on the entirely sane." *Op. cit.*, § 122.

From the experience of Asylum treatment of the insane in all countries alike, it is demonstrable that there is a large proportion of patients to whom a certain amount of daily mechanical labor, out of doors when practicable, but labor of some sort, may be assigned with benefit to their moral as well as their physical nature. There are cases where physical health is not so undermined as to require absolute rest, quiet, or seclusion, as happens in many instances of so called moral insanity. And if this be so, then there seems no reason why the state cannot, as part of the moral reformation of the wrong-doer, impose obligations of duty upon him, whatever may be the name given to such obligation, whether task, moral discipline or punishment. Legal, like moral responsibility, should be graduated according to knowledge and power, and wherever there is qualified responsibility there should be qualified punishment. The framers of the statute wrote wisely when they enacted that "No act done by a person in a state of insanity can be punished as an offense." Certainly not. But, nothing forbids its being punished as an error, or in the same qualified way as are the wrongs committed during

nonage, that is to say, by moral and physical penalties intended not to cause bodily suffering, but to teach self-control and respect for the rights of others.

On this point Dr. MAUDSLEY says, distinctly, that, "To be strictly just, we must admit some measure of responsibility in some cases, though not the full measure of a sane responsibility in any case; at the most we must admit an insane responsibility, such as is recognized in the management of asylums where the insane are worked upon by ordinary motives, but are not punished as fully responsible agents, when these motives fail to hold them in check and they break out into violence." (*Responsibility in Mental Diseases*, p. 199.)

Hence incarceration in an asylum is all that the State can legally do in the matter of disposing of its insane malefactors; and, in fact, it is all that it is necessary for it to do, both morally as well as medically, in order to protect itself and vindicate its authority. Bodily penalties—meaning penal labor, or a sentence of capital punishment causing mental terror by anticipation of a violent death—are things not to be entertained; for they would only further irritate and derange an already unbalanced mind, and put the State in the attitude of a vindictive avenger, instead of a guardian of the weak and suffering, and a protector of all. From the personal testimony of the insane in our own criminal asylum, I can affirm that their detention is in itself a punishment of which, in a majority of cases, they are keenly conscious, recognizing it as something more penal than medical, and, more painfully still, comparing its indefinite duration with the determinate periods of the convict for a term of years. Hope is the anchor of the soul in all human beings alike, whether sane or insane, and there is no more painful spectacle in this world than that of those, whose minds partially shaking off the eclipse of insanity, awake to find themselves in the midst of insane criminals, with no definite day of release. Let those who

think the insane malefactor is not sufficiently punished by being detained in a criminal asylum, visit such an institution, and converse with some of the old and more rational inmates, and they will be satisfied that the dread of the plea of insanity as a door of escape for criminals from punishment is a popular myth, born of ignorance.

The knowledge of right and wrong and the capacity to judge correctly of the nature of the act committed, are still held by our courts to constitute the only proper tests of criminal responsibility. In order, therefore, to prove the existence of such an insanity as will, under the statute, exonerate a party indicted from punishment, if convicted, the absence of this moral and mental capacity must be affirmatively proved. A review of the leading cases will show this more particularly.

In *Freeman v. The People* (4 Denio, 9), it was held that the test of insanity as a defense to an indictment is, whether at the time of committing the act the prisoner was laboring under such mental disease as not to know the nature and quality of the act he was doing or that it was wrong."

In *People v. Kleim* (1 Edm. S. C. 13), it was held that, in order to constitute insanity a defense in a criminal accusation, it must be proved that, at the time of committing the act, the prisoner was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know, that he did not know he was doing what was wrong; and the question whether he knew the difference between right and wrong is not to be put generally, but in reference to the very act with which he was charged. The same doctrine was re-affirmed in *People v. Divine* (*Ib.* 594); and again in *People v. Pine* (2 Barb. 566). Both the theory of a knowledge of right and wrong in the abstract, and a refinement of the same theory in a knowledge of right and wrong with reference to the particular

act are here insisted upon as the legal tests of responsibility.

In *Willis v. The People* (32 *N. Y.* 715, and 5 *Parker's Cr.* 621), it was held on review that the court below charged the jury properly "that a man is not insane who knows right from wrong; who knows the act he is committing is a violation of law and wrong in itself. That an irritable temper and an excitable disposition are not of themselves evidence of insanity. Consequently, when the prisoner at the time of the killing is in such a state of mind as to know that the act he is committing is unlawful and morally wrong, he is responsible as a sane man."

In the case of *The People v. Sprague* (2 *Parker's Cr.* 43), a young man was indicted for robbing a female of her shoe in daylight in the public streets of a city, and it being proved that the accused had been for several years, and ever since an injury to his head, in the habit of taking the shoes of females, wherever he could find them, and secreting them without any apparent object for so doing, and that insanity was a hereditary disease in the family of the prisoner on the side of his mother, with other circumstances tending to establish monomania, the jury were instructed that if the prisoner was of unsound mind and acting under an impulse which at the time overthrew or obscured his knowledge or capacity to judge of right and wrong, then he was not capable of committing a crime. He was, accordingly, acquitted.

In *People v. McFarland* (8 *Abb. Pr. [N.S.]* 57), it was held that the prisoner must not only know that the act is unlawful and morally wrong, but must be deprived of reason sufficient to apply such knowledge and to be controlled by it. The power of distinguishing between right and wrong in reference to the act is not alone decisive.

In *Patterson v. The People* (46 *Barb.* 626), it was held that an offer to show the mental grade and capacity of the

prisoner, which offer was made not for the purpose of proving him to be *non compos mentis*, but to show the measure of his intellectual capacity, is not admissible.

In *O'Brien v. The People* (48 Barb. 282), it was held that *delirium tremens*, like insanity, if it deprives the prisoner of the capacity to know what he was doing, or of knowing right from wrong, saves him from any criminal responsibility for his acts.

In *People v. Montgomery* (13 Abb. Pr. [N. S.] 209), it was held that "proof that the accused was insane when the crime was committed, is not enough to require the jury to acquit. It must be shown that the insanity was such as to destroy, for the time at least, the consciousness of the distinction between right and wrong in reference to the act charged."

"When such a degree of insanity is shown to have existed previous to the offense, the people must prove, in order to convict that, when the crime was committed the insanity had, at least temporarily, passed away, leaving the prisoner in that condition of mind in which he was morally and legally responsible for the crime; but they are not bound to show that the mind had thrown off the disease, and was restored to a healthy condition."

Montgomery, although proved to be an old epileptic, was convicted. Sentence was, however, suspended upon the finding of an inquisition that he was insane at the date of the offense, and he was sent to the asylum for insane criminals.

In *Flanagan v. The People* (52 N. Y. 467), it was held that the test of responsibility is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act complained of. And that the law does not recognize a form of insanity in which the capacity of distinguishing right from wrong exists without the power of choosing between them.

In *People v. Waltz* (50 How. Pr. 204), WESTBROOK, J., in charging the jury, said: "You are not to ask yourselves

the vague question whether the prisoner was or was not insane, without having any clear or definite comprehension of what insanity is, but you are to ask yourselves the question, did the prisoner understand this act when he raised that hatchet and smote Holcher those fatal blows; did he understand that the laws of God and man forbade him, and did he know that those laws would hold him responsible for it when discovered and brought before a tribunal of justice? If he did, he is guilty. No matter though he says and his counsel for him argue, that an irresistible, mysterious power urged him on to the commission. This is no defense. The law says it is the duty of the person to resist these influences and to successfully resist them." (*Vide report of this case in Am. Jour. of Insanity for July, 1874.*)

The sum of all the foregoing adjudications may be stated in a few words. It is simply this, viz.: that to acquit on the ground of insanity in New York, it is not enough that there be a doubt of the prisoner's sanity; but his insanity must be affirmatively proved. Nothing short of this will suffice. (*Sellick's case, 1 City Hall Rec. 185; People v. Robinson, 1 Park. Cr. 649; 2 Ib. 235.*)

If we now compare these decisions with the leading English cases cited below, it will be seen that the courts of New York have followed very closely in the path of authorities that can no longer stand before the more accurate knowledge of insanity possessed at this day. Thus, in Lord FERRER'S case, it was held that if the accused had such possession of reason as enabled him to comprehend the nature of his actions and discriminate between moral good and evil, that was sufficient. "He was found guilty and executed." (19 *How. St. Tr.* 947.) And in Arnold's case it was said that "it must be a man that is totally deprived of his understanding and memory and doth not know what he is doing no more than an infant, a brute or a wild beast." (16 *How. St. Tr.* 695, 764.)

In Bellingham's case, it was held that the prisoner must be incapable of judging between right and wrong. (1 *Collinson on Lun.* 636 ; *Regina v. Townley*, 3 *F. & F.* 847.)

And in Offord's case, Lord LYNTHURST said, "The question was, did he know it was an offense against the laws of God and nature?" (5 *Carr. & P.* 168 ; *Bowler's case*, 54 *Ann. Reg.* 310 ; *Reg. v. Higginson*, 1 *Carr. & K.* 129.)

In *Reg. v. Vaughan*, TINDAL, C. J., said that "it must be shown that the prisoner had no competent use of his understanding so as to know that he was doing a wrong thing in the particular act in question." (1 *Cox's C. C.* 80.)

In Oxford's case, Lord DENMAN said, "If you think that the prisoner was, at the time, laboring under any delusion which prevented him from judging of the effects of the act he had committed, you cannot find him guilty. But if, though laboring under a delusion, he fired the loaded pistols at the queen, knowing the possible result, though forced to the act by his morbid love of notoriety, he is responsible and liable to punishment." (*Reg. v. Oxford*, 9 *Carr. & P.* 525 ; *Reg. v. Stokes*, 3 *Carr. & K.* 185 ; *Reg. v. Layton*, 4 *Cox's C. C.* 149 ; *Reg. v. Barton*, 3 *Ib.* 275 ; *Reg. v. Davies*, 1 *F. & F.* 69 ; *Reg. v. Burton*, 3 *Ib.* 780 ; *Reg. v. Leigh*, 4 *Ib.* 915.) In the leading case of *Reg. v. McNaughten* (10 *Cl. & Fin.* 200), which came up on review before the House of Lords, the subject underwent the most thorough discussion through a series of questions propounded to the Judges which, with their answers, are given below.

1st. What is the law respecting alleged crimes, committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons ; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, or redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit ?

2d. What are the proper questions to be submitted to the jury, when a person, alleged to be afflicted with insane delusion respecting

one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defense ?

3d. In what terms ought the questions to be left to the jury, as to the prisoner's state of mind at the time when the act was committed ?

4th. If a person, under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused ?

5th. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was laboring under any and what delusion at the time ?

The opinion of the court upon these interrogatories was delivered by Lord Chief Justice TINDAL, as follows: "My Lords, Her Majesty's Judges, with the exception of Mr. Justice MAULE, who has stated his opinion to your Lordships, in answering the questions proposed to them by your Lordship's House, think it right in the first place to state that they have forbore entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case, and it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon. They deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given them by your Lordship's questions; they have therefore confined their answers to the statements of that which they hold to be the law upon the abstract questions proposed by your Lordships; and as they deem it unnecessary in this particular case to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your Lordships.

In answer to the first question, assuming that your Lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion, *that, notwithstanding the party accused did the act complained of, with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public*

benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law—by which expression we understand your Lordships to mean the law of the land.

As the second and third questions appear to us to be more conveniently answered together, we have to submit our opinion to be, *that the jury ought to be told, in all cases, that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction ; and that, to establish a defense on the ground of insanity, it must be clearly proved, that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing ; or if he did know it, that he did not know he was doing what was wrong.* The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely if ever leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction ; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable ; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong ; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The answer to the fourth question must of course depend on the nature of the delusion ; but making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, *we think he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real.* For example, *if under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-de-*

fense, he would be exempt from punishment. If his delusion was, that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

In answer to the fifth question, the last question, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

In the leading American case of the *Comm. v. Rogers* (7 Metc. 500), C. J. SHAW, of Mass., while closely following the dictum of the McNaughten case, went a step further in declaring that the act of a disordered mind, inspired by a delusion and without reference to its instigating motive, might operate as an excuse for crime. The following are his words:

“A person, therefore, in order to be punishable by law, or in order that his punishment by law may operate as an example to deter others from committing criminal acts, under like circumstances, must have sufficient memory, intelligence, reason and will, to enable him to distinguish between right and wrong, in regard to the particular act about to be done, to know and understand that it will be wrong, and that he will deserve punishment by committing it.

This is necessary on two grounds:

1st. To render it *just* and reasonable to inflict the punishment on the accused individual, and

2d. To render his punishment, by way of example, of any utility to deter others in like situation from doing similar acts, by holding up a counteracting motive in the dread of punishment, which they cannot feel and comprehend.

* * * * *

In order to constitute a crime, a man must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming

violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

But these are extremes easily distinguished and not to be mistaken. The difficulty lies between these extremes, in the cases of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusions as to act under false impressions and influences. In these cases, the rule of law as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stood to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong, and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts. If, then, it is proved to the satisfaction of the jury, that the mind of the accused was in a diseased and unsound state, the question will be, whether the disease existed to so high a degree, that, for the time being, it overwhelmed the reason, conscience and judgment, and whether the prisoner, in committing the homicide, acted from an irresistible and uncontrollable impulse; if so, then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of a mind directing it.

The character of the mental disease relied upon to excuse the accused in this case is partial insanity, consisting of *melancholy*, accompanied by delusion. The conduct may be in many respects regular, the mind acute, and the conduct apparently governed by rules of propriety, and at the same time there may be insane delusion by which the mind is perverted. The most common of these cases is that of *monomania*, when the mind broods over one idea, and cannot be reasoned out of it. This may operate as an excuse for a criminal act in one or two modes. Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if it were true, would excuse his act; as where the belief is

that the party killed had an immediate design upon his life, and under that belief the insane man killed him in supposed self-defense. A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws, and the laws of Nature, or

2d. This state of delusion indicates to an experienced person that the mind is in a diseased state, that the known tendency of that diseased state of the mind is to break out into sudden paroxysms of violence, venting itself in acts of homicide, or other violent acts toward friend or foe indiscriminately, so that, although there were no previous indications of violence, yet the subsequent act, connecting itself with the previous symptoms and indications, will enable an experienced person to say that the outbreak was of such a character; that for the time being it must have overborne memory and reason; that the act was the result of the disease, and not of a mind capable of choosing; in short, that it was the result of uncontrollable impulse, and not of a person acted upon by motives, and governed by the will."

The case of *The People v. Kleim* (1 *Edm. S. C.* 13) was the first one in New York in which judicial cognizance was taken of the fact that moral liberty is not always, nor necessarily the accompaniment of a correct intellectual apprehension of an act on the part of the insane. There it was held that the prisoner "must know that the act was wrong and punishable, and *be able to compare and choose between doing it and not doing it.*" In the subsequent case of the *People v. McFarland* (8 *Abb. Pr.* [*N. S.*] 57), an approximation to this wise and scientifically correct opinion was made, but not sufficiently so to cover the real question in issue. The whole of this progress, however, has been swept away by the opinion rendered by our highest appellate court in *Flanagan v. The People* (52 *N. Y.* 467, *A. D.* 1873). This decision has reverted us to legal tests of criminal responsibility which courts in other States are everywhere discarding as unsound, because against evidence, and it has accordingly placed our criminal jurisprudence far in the rear of our equity, in a field where both should

walk abreast. (*Comm. v. Haskell*, 2 *Brewster*, 401; *State v. Jones*, 50 *N. H.* 370; *Stevens v. State*, 31 *Ind.* 485; *State v. Felter*, 25 *Iowa*, 67; *Anderson v. The State*, 43 *Conn.* 514.)

NO LEGAL TEST OF INSANITY.

Insanity being in its essence purely a question of fact, while in its application to human responsibility it becomes a mixed question both of law and fact, it is not surprising that the common law should have failed to give it any status as a class distinction upon which to establish a series of distinct presumptions. "Insanity," says Prof. Amos (*Science of Law*, p. 107), "in the largest sense of the term as used for legal purposes, is a temporary or permanent disorder of the relations between the mental and physical functions of man, of such a nature as to destroy the value of current presumptions, founded on those relations as existing in a state of health." And further on this same high authority says, that "for judicial purposes, insanity is merely a term to cover a certain class of exceptions from the current presumptions as to persons of a certain age, who are, other circumstances being favorable, competent to foresee the consequences of their acts." (*Ib.* 108.)

This philosophical rationale of the position accorded to insanity in the field of jurisprudence will prepare us to see why its existence as a fact within the scope of legal evidence has at times been so difficult to establish that it would be unsafe on mere hypothesis, or even negative proof, to permit it to sweep away long settled presumptions. In a problem so purely medical, the legal recognition of insanity must and can only reflect the current medical opinions of the day. And since medical evidence often differs widely as to the degree and effects of this disease upon human character, it is only in proportion as our knowledge of it has become more exact and our deductions upon its consequences more accurate that it has vindicated its claim to a status in the field of Municipal Law.

Indeed, it is only within comparatively modern times that a lunatic was adequately protected in his person, or could avoid at law an act procured from him through fraud and duress. Even as late as BLACKSTONE'S day this principle of non-protection was not wholly discarded by English courts, and he speaks of it as only "restrained," not exploded, because it was in truth settled law. Thus he says: "The maxim that a man shall not stultify himself, hath been handed down as settled law, though later opinions, feeling the inconvenience of the rule, have, in many points, endeavored to restrain it." (*Comment's Book*, 2*d*, p. 291; *Comber'h*, 469; 3 *Mod.* 310.) And, it is only in our day that Chancellor KENT could affirm that "the principle advanced by LITTLETON & COKE, that a man shall not be heard to stultify himself, has been properly exploded, as being manifestly absurd and against natural justice." (*Comment's*, vol. 2, p. 594.)

The attempt to establish a legal test of insanity, founded on so variable a symptom as delusion, is another illustration of the confusion into which the effort to set a legal boundary around the operations of a physical law always eventuates. Such errors belong to the infancy of knowledge in any department of physical science. They are the beginnings only of a glimmering of the disk of truth as seen in the early dawn of a scientific day. Later, and as the meridian light reaches us, we discover that no single symptom marks any disease, any more than a single feature establishes a human character. Then it is we begin to discover that all physical facts are the result of the grouping of various factors, and that every thing relating to human organization or conduct is expressive of unity only in spirit and design, and of plurality always in constitution and physiognomy. In nothing can a more striking illustration of this error of establishing a legal test of insanity be found than in the settled adoption of delusion as a presumption of testamentary incapacity, and its sim-

ultaneous rejection in cases of doubtful criminal responsibility. No good reason ever has and none ever can be given why, in the language of Judge DOE, "what was a test of infallible mental disease in a man when he disinherited his child, was no test of mental disease in him when he deprived his child of life." (*State v. Pike*, 49 N. H. 434.)

When Lord ERSKINE, therefore, in the celebrated Hadfield case (27 *How. St. Tr.* 1281), laid down the doctrine, which was subsequently so generally followed, that "delusion, when there is no frenzy or raving madness, is the true character of insanity, and when it cannot be predicated of a man standing for life or death, he ought not, in my opinion, to be acquitted," he introduced a rule based upon medical opinions of insanity that are no longer tenable, and which only an obstinate consistency, willfully ignoring all proofs to the contrary, clings to as a cherished idol. Now, the concurrent testimony of all experts in insanity is to the effect that many persons notoriously insane exhibit no delusions. (*Blandford on Insanity*, p. 309.) And Dr. RAY, after reviewing the right and wrong tests in the abstract and the concrete, as also the test of delusion, comes to this indisputable conclusion. "It appears then, that, as a test of responsibility, delusion is no better than those before mentioned. The truth is, there is no single character which is not equally liable to objection." (*Med. Jur. of Ins.*, § 24.) The leading authority of continental Europe, the late Prof. GRIESINGER, affirms this doctrine in the following still more striking words, viz.: "The presence of a delusion is not at all necessary to constitute an individual insane, even in the narrowest sense of the term (in contradistinction to single disturbance of the affective sentiments). In many cases no special delusion is present, or at least, there is none exhibited, but the sentiments, dispositions and conduct are altered in a morbid manner, and owing to a morbid state of the brain the individual is in-

fluenced, so that the healthy faculty of judgment is obscured, the intelligence formally involved and the spirit held in bond." (*Mental Path. Sydenham Society, Ed'n.* § 72, p. 118.)

But the strongest argument against the establishment of any legal test of insanity must ever rest in the fact that insanity can never be defined even as a physical condition. We must ultimately repose upon a description alone of its effects, as so many departures from the usual habits of thought, conduct or feeling of an individual. In no one must we expect to find, nor shall we, a series of identical results occurring either in chronological order, or in intensity of manifestation. A noisy drunkard, though delirious, is not nearly as insane as many a quiet, moping melancholic, whose mind is heaving in disordered action. In *Queen v. Oxford*, Dr. CHOWNE testified, that patients are often impelled to commit suicide without any motive (*Ann. Reg.* 1840, *Part* 2, p. 262); and in *Queen v. McNaughten*, Dr. MONRO testified that insanity may exist without any delusion—and with a moral perception of right and wrong, and that this was very common; that a person may be insane and yet capable of managing his affairs, etc. (*Ann. Reg., Part* 2, p. 350.) Again, in *Queen v. Pate*, Dr. CONOLLY, the very highest authority in Europe at that time, testified, that the prisoner was of unsound mind, but that he did not suffer from any particular delusion; and that he was well aware he had done wrong and regretted it. Dr. MONRO fully sustained Dr. CONOLLY's testimony, saying: "I agree with Dr. CONOLLY, that he is not laboring under any specific delusion. I think he may have known very well what he was doing and have known that it was very wrong, but it frequently happens with persons of diseased mind that they will perversely do what they know to be wrong." (*Ann. Reg.*, 1850, p. 331.)

It seems needless to multiply authorities upon a subject which, involving a purely scientific fact like insanity,

must be admitted to be more properly cognizable by those who have made a special study of that disease, than by non-experts. And if a fact, indefinable in itself, as insanity is conceded to be, is not reducible to a fact in law, then "it is unfortunate that courts should maintain a contest with science and the laws of nature upon a question of fact which is within the province of science and outside the domain of law." (*Per* DOE, J., in *Boardman v. Woodman*, 47 N. H. 150.)

The whole question of criminal responsibility is thus seen to turn, at common law, not upon this or that form of insanity; not upon delusion, nor upon knowledge of right or wrong, or any other single test either moral or intellectual, but upon the only basis upon which man is made a responsible being either before God or before the law, viz.: the possession of power over his own mind in action (*compos mentis*), which, when lost, leaves him an automaton, to be governed wholly by the dominating power of sin or disease. This was the view evidently taken by Chief Justice PERLEY, of New Hampshire, in the *State v. Pike* (49 N. H. 399), when, in charging the jury, he said, that "neither delusion, nor knowledge of right and wrong, nor cunning in planning and executing the killing, and escaping or avoiding detection; nor ability to recognize acquaintances, or to labor, or to transact business, or to manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury."

An hour's conversation with the insane in any asylum will suffice to show that delusions are not omnipresent, and that the knowledge of right and wrong is common in all forms of mental unsoundness outside of idiocy and dementia. All experts in insanity affirm this, and it has also been put upon record in the most emphatic manner. Thus: At the annual meeting of the British Association of Medical Officers of Asylums and Hospitals for the Insane, held

in London, July 14, 1864, at which were present fifty-four medical officers, it was unanimously

Resolved, "That so much of the legal test of the mental condition of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently among those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions."

In the case of *The People v. Kleim* (1 *Edmonds*, 28 n.), Judge EDMONDS thus illustrates the value of the right and wrong test when speaking of the defendant: "He knew the act was wrong, yet he was insane. The act of piling up shavings, fastening the woman in her hut, and forcing her back into the flames was not 'an involuntary act of the body without the concurrence of a mind directing it,' yet he was insane. He knew the 'act was contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty,' yet he was insane. He knew 'he was acting contrary to law,' yet he was insane. He knew 'the act was one he ought not to do,' yet he was insane."

The error into which so many of the foregoing tests of insanity have led courts endeavoring to apply them to practice, has arisen from overlooking the general legal import of the term *non compos mentis*. If we accept the term "unsound mind" as a generic one, and that certainly was the original meaning given to it by COKE, where he says "*non compos mentis* explaineth the true sense, and calleth him not *amens*, *demens*, *furiosus*, *lunaticus*, *fatuus*, *stultus* or the like, for *non compos mentis* is most sure and legal," (*Coke Litt.* 246 a), we shall have no difficulty in adopting it by legal implication to all forms of unsound mind with or without the presence of delusions. All that the ety-

mology of the term *non compos mentis* means at law is, "a mind without power of controlling itself in action," by reason of any cause not self produced. Hence, intoxication or giving way to the violence of temper do not constitute a man *non compos* in the eye of the law.

In *Comm. v. Haskell*, BREWSTER, J., said, that "the true test in all cases lies in the word 'power.' Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong?" (2 *Brewster*, 401.) This was an affirmance of the doctrine laid down in *People v. Kleim*, before cited—a doctrine which is receiving indorsement in proportion as the solidity of its foundations is brought to the notice of courts. (*Stevens v. State*, 31 *Ind.* 485; *State v. Felter*, 25 *Iowa*, 67; *Com. v. Hart*, 2 *Brewster*, 546; *Andersen v. State*, 43 *Conn.* 514; *Roberts v. People*, 19 *Mich.* 401.)

In *People v. Stillman*, tried at the Monroe Oyer and Terminer, March Term, 1877, Judge DWIGHT in his charge to the jury said: "According to the law of the State which governs you and me in our relations to this case, a man is accountable for the act which he performs, unless his insanity be of such a character as that by reason of a fixed disease of the mind he is deprived either of consciousness of the act, or of the knowledge of the moral and legal quality and character of the act which he commits, or by some disease of his mental nature is deprived of the ordinary power of volition to will that which he knows to be right. That is the legal standard by which you are to be governed. Was his mind so far affected by fixed disease as that he was, at the time he committed the act, deprived either, first, of consciousness that he did the act, or secondly, was deprived of the power to judge the moral and legal character of the act which he committed; was unable to judge that the act was morally wrong, or that it was legally wrong, or that it subjected him to the penalty of the law; or thirdly, was absolutely deprived

by mental disease of the power to will and to do that which he knew to be right."

It will be noticed that in these instructions to the jury Judge DWIGHT introduced the element of *power over self, to choose the right and avoid the wrong*, as a necessary prerequisite to responsibility. This is unquestionably sound doctrine, and it is accordingly most unfortunate that the Court of Appeals should have entirely overlooked it in their latest decision upon this point as given in *Flanagan v. The People*. From the days of SOCRATES down to those of Sir WILLIAM HAMILTON, no mental philosopher has ever taught that knowledge of a moral relation implied any thing more than an act of reflection consequent upon perception. But nothing in practical experience shows that knowledge of a thing implies either the will to act upon it, or the power to act upon it even as a matter of choice. There are states of mental catalepsy in which the will cannot act, although the perception be perfect. The knowledge of right and wrong may be good enough, but the power to choose may be paralyzed. If these states can be shown to result from permanent mental disease, why should the law refuse to recognize them? When the court therefore say, as in the case of Flanagan, that the law does not recognize a form of insanity, in which the capacity of distinguishing right from wrong exists without the power of choosing between them, does it not attempt to legislate what the law of nature shall be, rather than to decide according to what it is?

It would seem under the shadow of these views, already so well certified to us by experts as correct expressions of mental laws, and already adopted by courts of co-equal authority with our own, that the proper manner of presenting cases of alleged insanity in criminal trials to a jury is to require them to determine the following facts, viz.:

First. Whether the defendant, at the time of the alleged

crime, had mental capacity sufficient to know the nature and consequences of the act he was committing?

Second. Whether, if he did so know them, he had a felonious intent in committing the act?

Third. Whether, knowing the nature and consequences of the act, he had the power to choose between doing or not doing it?

Fourth. Whether, supposing he had lost the power of choosing between right and wrong in reference to the particular act, he had lost that power through *disease*, and not through intoxication, violent anger, or any form of self-produced mental convulsion?

In measuring criminal responsibility by the quality of the act committed, and graduating penalties according to the evil intent evinced, the law aims at deterring sane minds from the commission of crime. But such considerations do not weigh with the insane as preventives to violence. Those so disposed are under duress to a power superior to any influences of a self-directing character. Hence, we cannot apply the same standard of moral nor legal responsibility to them, even when they exhibit malice, revenge, cunning or cruelty in their acts, because the legal idea of malice implies sanity, and when that has once departed, it carries with it all degrees of moral classification. When free to act, as disease impels them, the insane may exhibit every evil passion of our nature without adding a feather's weight to the wrongfulness of their actions. Dr. MAUDSLEY simply repeats the experience of all observers when he says that, "a person does not, when he becomes insane, take leave of his human passions, nor cease to be affected by ordinary motives; and when he acts from one of these motives, he does not, by doing so, take leave of his insanity; if he kills some one out of revenge for an imagined injury, he is still a madman taking his revenge." (*Maudsley, Responsibility in Mental Disease*, p. 198.)

We thus see that legal tests of criminal responsibility,

adapted to the sane, have no significance whatever when applied to the insane.

In an early case in this State the doctrine of lucid interval was applied to criminal responsibility, and it was there held that a party might be punished for a criminal act committed during this period. (*Clark's case*, 1 *C. H. Rec.* 176.) This was pushing the principle of legal responsibility to greater lengths than can be justified under any doctrine of the legal consequences of insanity now deemed authoritative. Nor has it ever been re-affirmed. It is true that Shelford (*on Lunacy*, p. 585) states it as though it were an established rule, but he cites no authority in support, and the preponderance of evidence is against its acceptance. It is manifest that, besides the difficulty always besetting the attempt to prove a lucid interval, it would not follow, even if established, that the party was a free moral agent; for he might have a return to lucidity, without corresponding power to control his conduct under even slight excitement.

BURDEN OF PROOF.

The definition of the crime of murder at common law, as given by COKE (3 *Inst.* 47), and by HALE (1 *P. C.* 425), is "when a person of sound mind and discretion unlawfully killeth any reasonable creature in being and under the King's peace, with malice aforethought, either express or implied." It is evident from the first term of the definition that no indictment can be sustained against a person found wanting in this pre-requisite of all responsibility. Notwithstanding, therefore, the legal presumption of sanity as the habitual condition of mankind, it is everywhere recognized that the sanity of the prisoner's mind must be made out affirmatively upon the trial as part of the case for the prosecution. Both sanity as well as the killing are essential ingredients in the crime of murder, and since the latter cannot be presumed but must always be proved,

there would seem to be no good reason why the former should be taken for granted as a matter of course. In cases of disputed identity, it seems to be clear on principle that the burden of proof rests on the government. There is no lack of authorities to sustain this doctrine. (*Fife v. Comm.*, 29 *Penn. St.* 429; *Hopper v. People*, 31 *Ill.* 393; *Miller v. People*, 39 *Ib.* 458; *Comm. v. McKie*, 1 *Gray*, 61, as annotated in *Bennett's Lead. Cr. Cas.*, p. 304.) And in cases of murder every ingredient of the crime must be proved. For the burden of proof is necessarily on the party having the affirmative. In *State v. Pike* (49 *N. H.* 431, 442), it was held that "the State was required to prove the allegation of malice, as well as every other material averment, beyond all reasonable doubt." The court reaffirmed the doctrine laid down in *State v. Bartlett* (43 *N. H.* 224), that presumptions of sanity and of malice are presumptions of fact (and not of law) that do not change the burden of proof, but merely authorize the jury to find sanity and malice without any direct testimony of witnesses upon these points. In other words, that they are presumptions of fact to be passed upon by the jury according to the preponderance of evidence before them.

In *State v. Marler* (2 *Ala.* 43), it was held that if the jury entertain a reasonable doubt of the prisoner's sanity, he should be acquitted. (See, also, *People v. Garbatt*, 17 *Mich.* 9; *Polk v. The State*, 19 *Ind.* 170; *Chase v. People* 40 *Ill.* 352; *Ogletree v. State*, 28 *Ala.* 692.)

In *Comm. v. Eddy* (7 *Gray*, 583), the court expounded the true rule, now supported by the weight of American authorities, which is, that the burden of proving that the prisoner was of sane mind when he committed the act is on the government, but as it is a presumption that all men are of sane mind, this presumption sustains the burden of proof until it is rebutted and overcome by satisfactory evidence to the contrary. The government is, therefore not bound to offer any positive evidence of sanity at the

opening of the case; but if the defendant introduces any evidence of insanity, the prosecution may reply by evidence of sanity. (See, also, *Comm. v. Heath*, 11 *Gray*, 303.)

This was the ground taken in *People v. McCann* (16 *N. Y.* 70), by the Court of Appeals, where the subject was carefully examined, and it was held to be error in a judge, on a trial for murder, to rule that "the question of insanity is matter of positive defense to be affirmatively proved, a failure to prove which (like the failure to prove any other fact), is the misfortune of the party attempting to make the proof; and the act being plainly committed by the prisoner, and the defense set up on his part that he was insane, the burden of proof is shifted. As sanity is the natural state, there is no presumption of insanity, and the defense must be proved beyond a reasonable doubt." But the principle laid down in this case, as in *Comm. v. Eddy*, always rests upon the assumed fact that there must have been some ground for doubting the prisoner's sanity, otherwise, and as an abstract proposition, it cannot be sustained. (*Walter v. The People*, 32 *N. Y.* 164; *O'Brien v. The People*, 48 *Barb.* 280; *Wagner v. The People*, 2 *N. Y.* 685.)

These principles, supported as we have seen, by many authorities, have now become a general rule in the law of evidence. They are a recognition of the fact that while there is ground for the presumption that all men are sane until the contrary is proved, that, after all, is only a presumption of fact, and not of law, and as such may be passed upon by the jury like any other material averment in the indictment. But since without sanity there can be no legal malice, and without malice there can be no legal guilt amounting to murder, it becomes essential that so essential a basis of responsibility as sanity should be proved affirmatively, the moment it is substantially denied. In the latest reported case of *State of Kansas v. Crawford* (*Am. Law Reg.*, Jan., 1875, Vol. 14, p. 21), it was held

that the defendant is never required to prove that he is not guilty by proving that he is insane, but the State must always prove that the defendant is guilty by proving that he is sane. It is true that the State is not required in the first instance to introduce evidence to prove sanity, for the law presumes *prima facie* that all persons are sane; and this presumption of sanity takes the place of evidence and proves sanity in the first instance. It answers for evidence of sanity on the part of the State. But, if other evidence is introduced which tends to shake this presumption, the jury must then consider the same and its effect upon the main issue of guilty or not guilty.

LETTERS AS CIRCUMSTANTIAL EVIDENCE OF INSANITY.

In seeking to establish the fact of insanity, all events relating to the physical and mental history of the party are admissible in evidence, because they are relevant to the furtherance of a conclusion which must ever rest upon a multitude of facts more or less explanatory of each other. We cannot, therefore, omit any, without imperiling the logical sequence belonging to it as a cause, or a proof of a mental condition not otherwise susceptible of explanation. Thus the history of his physical inheritance, of his youth and puberty, of diseases or accidents encountered, of his habits of life, of his general demeanor under emergencies, are all evidential facts tending to explain his mental status at any given time. (*Comm. v. Haskell*, 2 *Brewst.* 491.)

Apart from these proofs of active, external life, there are others belonging to the inner and introspective states of an individual, in which he reveals spontaneously his true mental condition. When not in the presence of others, nor consequently under the apprehension of self-exposure, every human being is more or less lulled into a full abandonment of himself to the worship of his mental idols. If then he writes letters, or keeps a diary, it is in these compositions that we shall often find the mirror in which his true mental

condition is most accurately reflected. And inasmuch as it is a recognized fact that letters written by lunatics under spontaneous impulse, are among the best indicia of their mental condition; such letters may at times become valuable corroborative proofs of the insanity of the writer. For while they are not *per se* evidence of the facts stated in them, yet when the sanity of a prisoner is involved, it has been held that a letter written by him prior to the commission of the alleged offense is admissible in evidence to throw light upon the condition of his intellect at the time the act was charged. And if it be shown that such letter was destroyed, secondary evidence of its contents should be received (*State v. Kring*, 64 *Missouri*, 591; *Wright v. Tatham*, 1 *Ad. & El.* 3, 8; 7 *Ib.* 313); and Mr. Greenleaf commenting upon the last cited case says unqualifiedly that "letters and conversation addressed to a person" whose sanity is the fact in question, being connected in evidence with some act done by him, are original evidence to show whether he was insane or not." (1 *Greenl. Ev.*, § 101.) If this be so then, there is still stronger reason for admitting in evidence letters written *by* him, as tending to reveal the true working condition of his mind at that time.

EFFECTS OF ALCOHOLISM ON DEGREES OF RESPONSIBILITY.

From time immemorial voluntary intoxication has always been held to be no excuse for any crime committed while under its influence. It is not, therefore, a legal defense to any indictment, since it does not affect the legal character of the crime, and in homicide is not material in determining whether the offense is murder or only manslaughter, where the act of killing is established. Yet, inasmuch as there are various results of intoxication as there are of other disturbances of the mental faculties, it has been found necessary to draw some line of discrimination between them, based upon the results exhibited, in order the better to apportion penalties according to responsibil-

ity. There has always been recognized a distinction between crimes committed in a state of voluntary intoxication and crimes committed by one suffering from the results of such intoxication. Thus, in *People v. Rodgers* (18 N. Y. 20), the court observed that "it has never yet been held that the crime of murder can be reduced to manslaughter by showing that the perpetrator was drunk, when the same offense, if committed by a sober man, would be murder." But, in respect to the results of such intoxication upon the mind, the court further on said: "If it (the reason) is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable." This condition represents insanity, and is only incidentally related to intoxication, for lewdness might produce it or any other abuse of the bodily functions.

But is there no middle ground upon which intoxication or its results, not yet recognizable as a fixed mental disease, may still render a person incapable of committing a crime of a certain degree? If degrees mean any thing, they mean capacity in the perpetrator to reach them in execution of his design. Suppose that capacity be wanting, what matters it how the incapacity arose, provided it was not voluntarily self produced? A man does not voluntarily produce *mania a potu* or *delirium tremens*, and the law says of both that they are diseases of the mind destroying responsibility. Yet both are the outcome of intoxication and both are associated with voluntary intoxication as their parent cause. At this point, however, the immediate effects of intoxication are seen to expire in results which are wholly involuntary on the part of their subjects. Why should not these results be weighed in their inception, as well as in their maturity? Must a man be a raving maniac before his insanity can be legally established? His *mania a potu* may follow closely upon and be so enwrapped with the last stages of drunkenness that the line of demarcation can with difficulty be drawn. Yet, instead

of the stupidity and narcotism of profound intoxication there will be a febrile energy, an exaltation of muscular force, and an explosiveness of action in speech and conduct, indicative of excessive irritation of the brain. This is no longer drunkenness, but the initial stage of mania. Such a mind is incapable of committing a crime to which the law attaches a supreme penalty. That penalty was intended only for the most depraved malefactors who, in the plenitude of moral liberty, deliberately break the law.

Hence it is that the differentiation of the crime of homicide into various degrees has always been considered a duty of the State, in the apportionment of its penalties. And if a sliding scale has thus been found necessary by which to judge the extent of the offense, and to affix the appropriate punishment, then it follows that the relation of the perpetrator to the crime, as a voluntary agent acting under motives, must form the only basis upon which legal responsibility can justly rest. That relation, it is manifest, can be measured only in one way, and that way is through the test of his mental state or animus at the time of the perpetration of the act.

The exact mental status of the perpetrator becomes, therefore, in all cases of doubtful sanity the *terminus a quo* for correctly determining his relation to the crime and his legal responsibility. It is true that the law recognizes no degrees in insanity, because this is a question purely of fact belonging more properly to the domain of medicine. Yet, even such a question is not outside the legitimate pale of its inquiries as is often seen in inquisitions looking toward the guardianship of the person or property of an alleged lunatic, and where it becomes the duty of the court to ascertain the extent to which the person's mind is weakened.

Since, therefore, there are degrees in homicide which are legally discernible, there must by parity of reason be conditions of mind pre-existent, upon which to rest gradations

of responsibility. Thus, a person may commit homicide in anger, knowing the nature and consequences of the blow he strikes, and yet not have deliberated upon the same so as to give to such act the premeditation and malicious character necessary to constitute murder. And there may be conditions of mind bordering upon insanity, during which he may know the nature and consequences of his acts, and even intend them, yet by reason of his mental weakness be so far unable to control his actions, under excitement, as to approximate them in external resemblance to those of a sane mind.

Admitting, also, that the defendant in a criminal action is always entitled to the benefit of any doubt as to the element of premeditation, it is sufficient to show that the party was not, at the time of the commission of the offense, in a condition of mind capable of deliberation, to negative all presumption of malice aforethought. Nor would it be any answer to this plea that he had made threats previously, if sufficient time had elapsed between them and the offense to afford a *locus pœnitentiæ*. In order to justify the conviction of such a person in the first degree, it should be shown that he had not only made threats, but that he was capable at the date of the offense of both deliberation and self-control. The absence of the first in a sane mind would reduce the crime to the second degree, and an incapacity for both, not purposely produced, should operate in like manner in the case of a person whose mind is weakened either by imbecility, or alcoholic mania. Such a person might with entire propriety be convicted of homicide in the second degree, because satisfying all the conditions which the law affixes to this class distinction. This was the doctrine substantially laid down by Judge C. C. DWIGHT of the Supreme Court, in his charge to the jury in the case of *The People v. Stillman*, referred to heretofore, and which may be said to be not only physiologically correct, but affirmative of current legal authorities.

Thus, in *People v. Cole* (7 *Abb. Pr.* [*N. S.*] 321), HOGEBROOM, P. J., in his charge to the jury said: "The premeditated design must be *completely* formed before the act, but no particular space of time is necessary to intervene between the *complete* conception of the design and its execution. If a *perfected* design precedes the act, it is murder."

The pivotal propositions on which are made to rest the legal definition of a murderous mind, are "the premeditated design when *completely* formed," and "the *complete* conception of the design." The court plainly intended it to be inferred by the jury that there are stages in premeditation, through all which the mind must pass, before there can be an act of completed premeditation, and that if there was neither a completely formed or perfected design, nor a complete conception of that design preceding the act, there was no murder. Undoubtedly this is a correct statement of the law of mind in action, and expresses the fact known to all close observers of mental operations, that there is no spontaneity in them, but that they express the results of preceding stages of incubation, which, however brief, are still susceptible of interruption at every step in their evolution, so that there may be stammering in ideality and in continuity of thinking, precisely as in memory or in speech. To say of the mind in such a state that it can premeditate or deliberate, is to say that it can stand, run, walk and survey at the same moment. No finite mind can be found which is not amenable to the influences of perturbations occurring in the circulation through the brain. And since the law has made a distinction between grades of homicide founded upon the very proper recognition of a difference between "heat of blood" (whatever that may mean physiologically), and coolness of blood, meaning more correctly mental poise, as contra-distinguished from mental vertigo or convulsion, there are valid reasons for carrying this distinction into the temple of mind, and ad-

judging that he who has no power to direct or regulate his mind in action is truly *non compos*, so far as capacity to premeditate and *perfect* a design to kill is concerned. Therefore, such a person should be presumed incapable of committing murder in the first degree until the contrary is proved.

In a recent case in Connecticut (*Andersen v. The State*, 43 Conn. 514), where a party had suddenly and without apparent provocation shot at several persons, killing one, such party not being shown to have been at the time under the excitement of drink or a quarrel, the court observed in relation to the degree of homicide of which the defendant could be properly convicted, as follows :

"It will be admitted that the degree of malice essential to murder in the first degree, like the act of killing or any other material fact, must be proved beyond a reasonable doubt, or the jury should not convict of the greater offense. Again, unsoundness of mind is a fact not susceptible of direct proof. In many cases, especially of partial insanity, or where the moral faculties appear alone to be affected, it can only be established by a series of facts, and circumstances and acts and conduct of the subject, extending over a considerable period of time." * * * "It is not our purpose either to ignore or recognize this form of insanity as an excuse for crime. The question is not whether an act committed under its influence is criminal ; whether the actor should be punished or be exempt from punishment, but whether he is a proper subject for capital punishment. * * *

"If it be conceded that one afflicted with it never loses the power to distinguish between right and wrong, and is at all times master of himself and may control his actions, still his mind may be enfeebled and the power of his will weakened so that he will readily yield to the influence of temptation or provocation, without that willful, deliberate and premeditated malice which is essential to constitute murder in the first degree. The jury therefore ought to

consider moral mania, if satisfied of its existence, in determining the degree of crime and give it such weight as it is fairly entitled to under the circumstances." * * * "It cannot be denied that the prisoner is a man of excitable temperament, a quarrelsome disposition, morbidly jealous and suspicious, imagining evils where none exist, or at least magnifying those which do exist, and when dyspepsia or fever and ague is upon him, or there is any other exciting cause, like business troubles, disappointments, etc., all these propensities are intensified and brought into greater activity. Such traits are the seeds which are likely to germinate and ultimately to result in confirmed insanity."

"Now, assuming that the disease had not yet reached that stage, but on the contrary that the prisoner could not only distinguish between right and wrong but had also the power of self-control which would enable him to do right and refrain from doing wrong, is it not quite probable from this evidence that the prisoner was laboring under an unusual and unnatural excitement, brought upon him by the circumstances in which he was placed and the atmosphere which surrounded him, and that by reason thereof his mind was in such a state and condition that he was incapable of committing murder in the first degree? May it not be possible that the man's unfortunate temper, excited by what he regarded as repeated and successive provocations, held all his faculties, moral and intellectual, in subjection to some extent so that he was incapable of reasoning correctly or rightly apprehending his relations to others? And that too, not only while he was under the direct and immediate influence of the exciting causes, but also after he had had time and opportunity for reflection, continuing even until after the commission of the homicide." * * *

"The common law is considerate of those who take life in the heat of passion, but makes it a capital offense to take life after time enough has elapsed for the passions to cool, making no allowance for differences in temper and disposition.

Under our Statute which divides murder into two degrees there is ample opportunity to make some allowance for those cases where, from any cause, excitement and passion continue beyond the limits allowed by the common law and impel to the commission of crimes which would not be committed in cooler moments. Reason and humanity require that this should be done. This may be, and we are inclined to think that it is a case in which the jury would be justified in regarding the distinction just adverted to."

In an earlier case occurring in Michigan, and where the case was similarly that of determining the responsibility of a party for an act involving the components of violence and intention, the court remarked that, "In determining the question whether the assault was committed with the intent charged, it was therefore material to inquire whether the defendant's mental faculties were so far overcome by the effect of intoxication, as to render him incapable of entertaining the intent. And for this purpose, it was the right and duty of the jury, as upon the question of intent of which this forms a part, to take into consideration the nature and circumstances of the assault, the actions, conduct and demeanor of the defendant and his declaration before, at the time, and after the assault, and especially to consider the nature of the intent and what degree of mental capacity was necessary to enable him to entertain the simple intent to kill under the circumstances of this case, or, which is the same thing, how far the mental faculties must be obscured by intoxication to render him incapable of entertaining that particular intent. Some intents, such as that to defraud, where the result intended is more indirect and remote, or only to be brought about by a series of combination of causes and effects, would naturally involve a greater number of ideas, and require a more complicated mental process than the simple intent to kill by the discharge of a loaded pistol. The question we are now con-

sidering relates solely to the capacity of the defendant to entertain this particular intent. * * * *

If, therefore, the intoxication was voluntary on his part, as all the evidence tended to show, unless he had become insane before he resorted to drinking, as presently explained, any degree of insanity thus produced would be a part of the consequences of such voluntary intoxication. And if from his past experience or information he had, while sane, and before drinking on that day, good reason to believe that, owing to a dormant tendency to insanity, intoxication would be likely to produce an extraordinary degree of mental derangement beyond the effects likely to be produced upon persons clear of any such tendency, he must be held to have intended this extraordinary derangement, as well as the intoxication, and the other results produced by it. * * * *

But if he was ignorant that he had any such tendency to insanity, and had no reason from his past experience, or, from information derived from others, to believe that such extraordinary effects were likely to result from the intoxication, then, he ought not to be held responsible for such extraordinary effects." (*Roberts v. The People*, 19 Mich. 422.) The same general principle was affirmed in the case of *The State v. Johnson*, 40 Conn. 136.

The common law in allowing the doctrines of provocation and heat of blood to be pleaded in mitigation of offenses, impliedly admits that a state of mind may be produced in an individual, which, although not one of positive insanity, yet reduces in varying proportions his criminal responsibility. The real extent of his moral freedom and power of self-control are, therefore, legitimate subjects of inquiry. Nor is it necessary to assume any mental unsoundness in order to justify offering it in evidence. And it will be seen from the before cited cases that drunkenness may also be taken into consideration in cases where what the law deems sufficient provocation has been given, because

the question in such cases is, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication, than when he is sober. (*Reg. v. Thomas*, 7 *C. & P.* 817; *R. v. Pearson*, 2 *Lewin*, 144.)

All the authorities may be considered as agreeing upon the doctrine that where premeditation forms an essential ingredient in a crime, drunkenness may nullify the capacity for forming a deliberate intention. Hence, where on an indictment for an attempt to commit suicide, it appeared that the prisoner was so drunk as not to know what she did, it was held that this negatived the intent to commit suicide. (*Reg. v. Moore*, 3 *C. & K.* 319.)

On the occasion of the introduction into Parliament, in 1874, of a Bill amending the law of homicide, Dr. BUCKNILL (Lord Chancellor's Visitor of Lunatics), in an address printed in the *British Medical Journal* for Nov. 1874, upon "Responsibility for Homicide," said: "The question of murder committed when the criminal is drunk or mad from drink, appears to me far more difficult and complicated than Mr. Stephens seems inclined to admit. Mr. Stephens appeared to see only two phases of the mental effects of drink, viz.: recent drunkenness in which a man knew what he was about, and which ought not to be excused from conviction for murder, and *delirium tremens*, which he owned to be a disease that would release from responsibility. Knowing somewhat more of *delirium tremens* than lawyers are supposed to do, I think you must admit that it is not a frequent condition of homicidal violence. A man suffering from this disease is usually too much prostrated in body and mind, too fearful and stricken to commit homicidal violence, though he possibly might do so under the influence of delusion, attempting himself to escape from supposed murderers or friends, in which case he

would clearly be of unsound mind sufficiently to exempt him from responsibility.

But the delirium from drink which commonly results in homicidal violence is that which we recognize as *delirium a potu*—the delirium which arises from the continued excitement of the stimulant, and not that very different delirium arising from the exhaustion which followed from those tremors of debility which we called *delirium tremens*. This *delirium a potu* did not yet appear to be recognized by lawyers. In drinking itself, also, as distinguished from delirium, there are varieties which ought to be recognized in relation to crime, that is if the principle be assumed that the punishment of criminals ought to be guided by some knowledge of the conditions of their guilt. We would not wish to shield men who take drink in order to nerve themselves for the commission of premeditated crime, as in the case of Victor Townley, who told me that he took brandy and opium to nerve himself for the dreadful crime for which undoubtedly he should have been hanged." (*Browne's Med. Jur. of Ins., Appendix.*)

The following propositions present an epitome of the foregoing views, together with the physiological laws upon which they rest, as evidential facts in support of their claim to a place in the jurisprudence of this subject :

First. All expressions of mental power as applied to human actions depend ultimately upon the character of the circulation in the brain. Sleep and wakefulness are the opposite extremes of these expressions.

Second. Mental poise is the ability to control mental action either by increasing, retarding or superseding its effects within the limits of conscious intention. Hence, one may act automatically and consciously and yet without intention. Intention means pre-vision of the consequences of one's own acts combined with continuing effort to secure such consequences. The law recognizes this when it

admits of a *locus pœnitentiæ* between the thought and the act. (*Sullivan v. The People*, 3 Park. Cr. 347.)

Third. In subjects of chronic alcoholism, the muscular contractility of the walls of all blood vessels is diminished through the diminished nervous energy transmitted to them, and narcotic dilatation ensues. In such states alcoholic stimulants of any kind cause rapid congestions, or accumulations of blood into vessels in excess of their power to empty themselves. Distention of their walls occurs, particularly in the capillaries, owing to the slowness of the circulation always present there. And each temperament having its own individual susceptibility, the brain in every person first tells the story of nervous excitement and instability. Consequently there may be in mental action, *stammering* in ideality, or in reflection, just as happens in speech when one is excited *ultra vires*.

Fourth. There can be no premeditation when there is no power to meditate. The mind cannot *run* and *stand* and *survey* at the same moment, except in automatic acts habitually performed without the conscious presence of the will. Deliberation on the other hand implies mental poise and a revolving of the idea by the mind by voluntary effort. Whatever requires premeditation, requires will, if it be a new act, born of a new train of ideas.

Therefore, a person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. (*Reg. v. Cruse*, 8 C. & P. 541; *Reg. v. Moore*, 3 C. & K. 319; *Reg. v. Thomas*, 7 C. & P. 817; *R. v. Pearson*, 2 Lewin, 144.)

Fifth. *Mania a potu* is a convulsive form of delirium expressive of alcoholism. It is distinguishable from *delirium tremens* in that it arises from the continued excitement of the stimulant, while *delirium tremens* arises from the exhaustion consequent upon protracted stimulation, and is

a condition of debility marked by tremors. The former is rather a sthenic condition, the latter one of prostration.

Sixth. The weaker the state of the nervous system, the more rapidly alcohol acts upon it, to overpower its rhythm. Hence, the children of drunkards are easily affected by it, and an old drunkard is easily ensnared by his first glass however long he may have abstained from drinking.

Seventh. Alcohol is only a temporary stimulant, its true character being that of a narcotic. The proof of which is that while a man may become intoxicated in an hour's time or less, it requires from 12 to 24 hours to free himself from its effects. Its real result is to paralyze the nervous centres, and to benumb the moral as well as the intellectual perceptions.

EPILEPSY IN ITS RELATIONS TO CRIMES.

No treatment of the subject of judicial psychology can be thorough which overlooks the factor of Epilepsy in the great problem of legal responsibility. Enough has been heretofore said upon the various phases of insanity to point to one definite conclusion, viz.: that it must always remain a question of fact, to be decided like any similar question, by the preponderance of evidence adduced. It has been already shown, therefore, that there can be no legal tests of insanity. The problem of responsibility must be determined in each case by the degree of medical proof adduced of genuine and controlling mental disorder. In speaking of criminal responsibility, as modified by insanity, we are presumed to be speaking of a class of beings in whom moral discrimination is not wholly obliterated, and the doctrine of imputability will have to be gauged and applied to them, according to the diagnostic precision with which experts can furnish definite opinions upon the mental physiognomy of personal acts.

The relations of epilepsy to insanity are so close that it

is against experience to doubt any longer that in advanced and permanently established conditions of the former disease, there can be any escape to the mind from the consequences belonging to such serious disturbances of the action of the brain. Without entering, however, into any medical discussions relating either to the causation of epilepsy or its pathology—or even to the paradox of its association, at times, with the highest manifestations of mental power, it will be sufficient, in a purely legal examination of its proper place in the drama of crime, to utilize the conclusions arrived at by experts, and thus to apply their opinions judicially to the question under consideration.

While we speak of a man as an intellectual being, capable, through his intellect, of self-government, we are also compelled to regard him as a being of sentiments, capable in like manner, through them, of guiding his conduct toward others. But the power by which he guides himself thus subjectively may in turn guide or govern him objectively. No argument is needed to convince us that a man may be enslaved by an intellectual idea which dominates him against his will, or again, that he may be enslaved by a sentiment or passion which, in like manner, subjugates his freedom of choice in action. The proof of these things we carry with us in our daily experiences. Moreover, either kind of enslavement may exist singly, or in unison with the other. But the constant and benevolent tendency of nature to maintain things in their appointed order is such, that it is doubtful whether, until the supremacy of the intellect is in some degree lowered, the sentiments ever acquire ascendancy over it. Man was evidently intended to be first of all things an intellectual being, and the law of his organization tends always to assert that primordial fact. His animal nature can only overpower his reason when this latter either desires and so permits it, or when disease weakens its powers of resistance. And here we come upon the very perplexing problem of the sphere of disease, of

its limits, and of both its direct and indirect or sympathetic influences.

It is now a universally accepted law of our nature that man lives organically, and represents himself externally in whatever way, solely through the agency of the nervous system. It is also demonstrated that this system is unitary in its functions, and that all its parts are in constant and immediate appreciation of the force originating in their great centres. Poise in them means balance of counter-acting parts, and any marked disturbance on the plus or minus side of this equator is characterized by spasm, or unequal tension of a nerve filament constantly engaged in giving passage to the electro-galvanic current. It is within the permitted limits of this poise that nervous harmony resides; and as every form of health has a definite margin of oscillation in which to exercise its functions, it is only when this margin is transcended that disease properly begins. Disease then means simply excess or diminution, and consequently perversion of the original manifestations of functional activity.

The brain being admitted to be the organ of the mind, whatever seriously disturbs it, should, and does in fact disturb its capacity to perform correctly the mental acts necessary for the processes of reasoning, either subjectively or objectively. Again, the spinal cord as a prolongation of the brain and the large ganglia associated with it as parts of a common system, are like the brain, when disturbed, influential in causing perversions of functions within the sphere of their immediate and ordinary influence. Taking the nervous system as a whole, physiology demonstrates that,

1st. The brain may and does influence directly the spinal cord.

2nd. That the spinal cord may and does in fact influence directly the brain.

3rd. That the brain may and does influence, through the

spinal cord, the great sympathetic or organic system of nerves; and that in turn.

4th. This great system may and does influence the brain through the same channel.

How far one man's mind may be influenced by causes originating in his great sympathetic system, while another may resist them; or how far one man's mind rather than another's may be influenced by causes originating in his brain, can never be fully known, and never *a priori*. But that any cause arising in some of the great nervous centers may be capable of creating, through sympathy, disturbances in the brain, wholly out of proportion to itself, is daily seen. And this arises from the fact that the latent tendencies residing in an organ can never be fully measured in advance of experience. Hence the despotism of hereditary tendencies.

Now in epilepsy we have a diseased condition of nerve tissue, either in the brain or spinal cord. Sometimes in both. Certainly, looking only at the sympathy of contiguity, we are forced to the conclusion that no spasm can occur in either of those contiguous and kingly organs, without repetition in the other. In fact this repetition is in some sense their duty. In one individual, indeed, we may have as a dominant expression of his disease spinal convulsions; in another cerebral convulsions of all grades, from vertigo to unconsciousness. But in every individual we have shock to the brain either initiated there or perfected. Experts tell us that shock is always pernicious; that it always leaves behind it weakness, if not exhaustion of parts, and when often repeated destroys the physiological capacity of the part. If a man had been repeatedly knocked down by the blow of a hammer upon the head, we should think this an evidential fact of importance in explaining observations of conduct, speech or temper in him. But epilepsy strikes deeper than a hammer, even though it does not often cause fracture of the skull with depression.

And what is more, its causal conditions, when once established, are always lurking in the system. Can they fail to influence the mind sooner or later?

In *People v. McNamara*, tried at the Steuben Co. (N. Y.) Oyer and Terminer, November term, 1877, before C. C. DWIGHT, P. J., which was on an indictment for murder, the defense being insanity arising from epilepsy, the court in charging the jury again drew a distinction between mental states in which there was, without the presence of actual insanity, an incapacity to form a premeditated intention to kill, such as the statute contemplates by murder in the first degree. The following was the language of this charge:

"The theory of this defense is, that the unsoundness or insanity upon which they rely, as relieving the prisoner at the bar from responsibility, was the result of the disease of epilepsy. As not every insanity relieves of responsibility, so I say that not every epilepsy produces insanity. It is undoubtedly established that the tendency of epilepsy is to the impairment of the intellect, producing, if long continued, a weakness of the mind, perhaps a change of habits and disposition, and if long enough continued finally results probably in dementia. It also appears that at all stages of the disease the patient is subject to attacks or seizures, sometimes called convulsions, of greater or less severity; that during these seizures, or convulsions the patient is deprived of consciousness and of sense, not only of right and wrong, but of sense of every kind. This is during the actual convulsions of what is known as the ordinary epilepsy, to which the name of *grand mal* has been given. It also appears that until the disease has progressed to dementia, that between such seizures and between the immediate effect of such seizures, there are intervals of entire consciousness and general sanity. There is also evidence tending to show that sometimes either before or after the actual convulsions there is a period of greater or less

confusion and disturbance of mind of more or less impaired consciousness and sense of right and wrong.

"If there was epilepsy in the case of the prisoner at the bar, to what extent had the epilepsy gone toward the destruction or impairment of his mind, and what was its effect upon his mind, at the time of the commission of the act of homicide committed by him? Here again you will have to recur to the facts of the case as disclosed by the evidence. To the history of the prisoner from his birth to the present time; to the facts, so far as any facts are intelligibly and credibly disclosed to you, in respect to the hereditary taint of the prisoner, or the question whether any of his ancestors or the collateral relatives of his ancestors were effected with the disease of epilepsy; the evidence upon the subject of the previous exhibitions and indications of the disease on the part of the prisoner himself; to the evidence of his character, physical and mental, and perhaps even in that connection, moral also, down to the commission of the homicide, and down to the present time; to the facts disclosed in the immediate circumstances and the history of the homicide itself.

"And even though he was an epileptic, unless the disease had so far impaired his intellect, or that the immediate effect of the disease was to render him incapable of that requisite of deliberate premeditation which is necessary to the crime of murder in the first degree. But to find the prisoner guilty of murder in the first degree, you must find first, consciousness, second, capability of judging of right and wrong, and ability to deliberate upon the act which he was about to commit. And all these you must find beyond a reasonable doubt. To find it murder in the second degree, you must find consciousness still, judgment of right and wrong still, and ability to intend the act which he committed, but without ability possibly, deliberately to premeditate that act."

Another remarkable feature of this disease is, that, be-

fore even leading to complete insanity, it produces very important modifications in the intellectual and moral conditions of certain patients, such persons becoming suspicious, very irritable and very susceptible to imaginary affronts, so that the slightest motives often provoke them to the commission of acts of outrageous violence. Sometimes even, all objective motives seem wanting, the individual's inner state being the sole provocation. And it is particularly in such persons that the sight of a crowd, of a fire, of a gun, a sword, or other destructive weapon, often suddenly awakens an attack of their disease, in the form of a mental convulsion. For in them, of all others, it may be truly said, that the

“Sight of means to do ill deeds,
Makes ill deeds done.”

An epileptic lives habitually in the border land of insanity. Hence in him slow, incubative stages cannot always be traced. All his visible stages are stages of explosion, any one of which may carry him at a leap into manifestations of fully developed insanity. In other words he is a masked lunatic. (*Ray's Med. Jur. Ins.*, § 460; *Whart. & Stille's Med. Jur.*, vol. 1, § 470; *People v. Montgomery*, 13 *Abb. Pr. [N. S.]* 207.)

Experience is daily producing proofs that forms of so-called moral insanity are, when present from birth, only manifestations of imbecility due to arrested development acting possibly upon inherited tendencies. Such persons are unconscious criminals who, like children, need to be reformed in penal institutions. They are not necessarily dispunishable. But it is the duty of the State to educate whatever of conscience is in them, or else to supply them with knowledge how to govern themselves by acquainting them with faculties suited to their reformation.

And experience again is daily accumulating proofs that another form of so-called moral insanity is more properly the effect of epileptic disturbances of the brain and great

sympathetic system, so that the party is easily thrown into a state of mental convulsion, not necessarily accompanied by muscular spasms, yet sufficient to destroy his power of self-control. He is intellectually perceptive, only as the somnambulist who sees and avoids obstacles, but cannot reflect or oppose his self-hood and will to the instinctive power which moves him. While it is true that there are various degrees in epilepsy, and that actual and confirmed lunacy cannot be predicated as the condition of all its victims, still one thing must be admitted, and that is that they are constantly approaching nearer and nearer to it, that they are not beings in a healthy condition of brain, and that they cannot with safety be exposed to the exceptional strain sometimes put upon that organ by the ordinary contingencies of life. In other words, they are human beings with a diseased brain, consequently they have an unstable mental and moral constitution which may give way when most needed to aid them in self-control. Crimes of violence when committed by such persons, either with or without provocation, must be gauged by a standard of its own. They may not be wholly irresponsible, but they never should be held to the same degree of accountability as the perfectly healthy. It is dissecting human responsibility too closely to say that a man with a diseased brain can be as free from intellectual blight, and moral turpitude as one who has a healthy organ. Some qualities must be changed in him both intellectually as well as morally, and in law as in morals, degrees in crime should express degrees in intention and moral freedom.

While it may be true, therefore, in theory, as Prof. Wharton states (*Med. Jur.*, Vol. 1, § 472) that "in general (uncomplicated epilepsy) the usual presumption of responsibility applies to acts committed in the intervals between one attack and another, such a principle cannot in practice be applied without incurring the grave risk of convicting a really insane man. For at the outset what are

called intervals cannot always be accurately determined in point of duration. The epileptic circle precedes as well as follows the convulsion by variable lengths of time, and the visible convulsion, or in masked epilepsy the invisible convulsion may, relatively, occupy but a very short time in the aggregate duration of the so-called fit. No human insight can declare with exactness the precise moment when the epileptic is freed from the enveloping haze of his malady. It is the most capricious of all disorders of the nervous system. It has its epiphenomena as well as its phenomena, and on the intellectual and moral disk of the individual it always leaves a penumbra even when no umbra can be seen. In two representative cases, that of Montgomery and Staudermann (both convicted of murder in the first degree) who came before me under a commission from the Executive to inquire into their mental sanity at the date of the offense, I became satisfied that neither of those men had been out of the epileptic circle for several years preceding the homicidal act. No one had previously considered them other than "queer, sleepy-headed," "irascible" and "fitty" or "moody," when a critical examination showed that both had suffered from nocturnal epilepsy as an habitual condition. (3 *Abbott's N. C.* 187, 200.)

This subject has been so fully examined by the most experienced and pains-taking minds in Europe, that it seems unnecessary while examining the results of their labors, for judicial purposes only, to elaborate its physiognomy any further. Dr. MAUDSLEY in his work on the Body and Mind, Dr. MOREL in his treatise on Mental Disorders, Dr. TROUSSEAU in his Clinical Lectures (*Vol.* 1, Lecture 3) and in this country, Dr. RAY in his Medical Jurisprudence of Insanity, Dr. ECHEVERRIA in his treatise on Epilepsy, Dr. JARVIS in his contributions to the *Am. Journal of Insanity*, Dr. HAMMOND in his work on Nervous Diseases, all bear concurrent testimony to the fact that an epileptic has always an unsettled mental and moral constitution plainly

indicating that the changes wrought in his nervous system are of a permanent character, and that, whether in or out of a "fit," he is still a diseased man, with but an imperfect power of self-control, particularly when moved by causes from within or without. What in other men would be justly deemed a fit of temper, or anger or premeditated cruelty, is in the epileptic but an insane ebullition of instinct and passion resulting from the convulsive vibration of the great nervous centers.

CHAPTER TENTH.

APPENDIX.

FORMS.

The object of forms being to present in a succinct and lucid statement the material facts alone upon which a court can exercise its jurisdiction, it is evident that in them, of all legal documents, surplusage is inadmissible. From the earliest days of the English chancery, when forms were largely repetitious statements of facts through an abundance of synonymous terms, there has been a tendency to simplify the language of pleadings so as to bring the substantive matters alone with which they deal into the field of discussion. The earliest forms in Lunacy are transcribed from writs, orders, and other papers, issued out of chancery in original cases. Thus Collinson, in his work published in the early part of the century, gives us the actual pleadings in cases reported in Atkyns and Vesey. Shelford imitates him somewhat in this respect, as did Stock before him. These cases establishing precedents which have never been disturbed in England, the forms used in them are still (except as required to be modified to meet statutory changes) in practical use there.

In our own State something akin to this has occurred in the history of our lunacy adjudications. No class of cases so eminently deserve to rank as leading cases, and precedents of their kind, as those which are to be found in the reports of Johnson, Paige and Wendell. Moulton, the

author of our earliest chancery practice, in his chapter of forms in lunacy, follows the example of Collinson in giving us transcripts of living cases, which were reported in Johnson and Paige. He was also most fortunate, as he himself informs us, in securing the assistance of Chancellor WALWORTH, who furnished many of these forms from unreported as well as other cases adjudicated by him. In this respect Mr. Moulton's forms represent the highest authority in this State in their origin.

The abolition of the Court of Chancery and the introduction of a Code of Civil Procedure, whose chief mission has been to simplify pleadings in their language as well as in their extent, have tended to render the phraseology of forms of less absolute value than formerly. The same rule accordingly applies to these statements in lunacy, as elsewhere in our pleadings, that they shall contain "a plain and concise statement of the facts constituting the cause of action, without unnecessary repetition." Keeping this rule in view, I have presented these forms in the simplest language possible whenever an opportunity to do so was permitted me. Many of these, however, are so old, and yet so unsusceptible of being changed without injury to the full presentation of the subject to which they relate, that originality in recasting them is out of the question. They must be accepted as rubrics of practice that have become crystallized by long usage, and so neither need, nor will they permit, any serious alterations.

Forms relating to *mortgages* or *conveyances by committees, statements of accounts by them, leases, sales, etc.*, have been omitted by me, because in the absence of statutory provisions requiring these acts to be performed in a special way, no assistance is required by any lawyer familiar with conveying, to enable him to draw papers of this kind. They do not, in fact, sufficiently differ from ordinary forms relating to the general subject to demand a special model for the practitioner in lunacy. Any work on chancery practice will

furnish the general form, and but little care will be required to introduce the distinguishing elements of the guardianship exercised by committees over the estate, and their fiduciary capacity in dealing with it, or again in returning their accounts to the court whose bailiffs they are in respect to this express trust. For these reasons, and in order not to unduly expand this volume by the introduction of forms not exclusively appertaining to lunacy, I have restricted myself, to the presentation of those most generally needed, and, therefore, most indispensable to the practitioner.

FORMS UNDER THE STATUTES.

COMMITMENT OF LUNATICS.

(No. 1.)

(Form of Medical Certificate.)

STATE OF NEW YORK, }
COUNTY OF , } ss:

I, _____, a resident of _____,
in the county aforesaid, being a graduate of _____
and having practiced as a Physician _____ years, hereby certify,
under oath, that on the _____ day of _____ I personally
examined _____ of *

*[Here insert sex, age, married or single, and occupation.]

and that the said _____ is Insane, and a
proper person for care and treatment, under the provisions of Chapter
446 of the Laws of 1874.

I further certify that I have formed this opinion upon the following
grounds, viz.:

[Here insert facts upon which such opinion rests.]

And I further declare that my qualifications as a Medical Examiner
in Lunacy have been duly attested and certified by *

*[Here insert the name of the Judge granting such certificate.]

Sworn to and subscribed before }
me, this _____ day of _____, 187 . }

*(Judge's approval of the finding in certificates of Lunacy. To be
printed or written upon the back of such certificates.)*

STATE OF NEW YORK, }
COUNTY OF , } ss:

Pursuant to the provisions of Chapter 446 of the Laws of 1874, I

hereby approve of the finding of Lunacy against A. B. upon the facts set forth in the within certificate.

Dated

(of Court.)

(No. 2.)

(Petition for Judge's Certificate as Examiner in Lunacy.)

STATE OF NEW YORK, }
COUNTY OF , } ss:

To the Hon.

Respectfully shows your Petitioner

of

in the County aforesaid,

who, desiring to be certified an EXAMINER IN LUNACY, under Tit. 1, Article 1, Sec. 2, of Chapter 446 of the Laws of 1874, deposes and says under oath, that he is a Graduate of

an incorporated Medical College in the State of , a permanent resident of the State of New York, has been in the actual practice of his profession for the space of years, and that his reputable character is vouched for by

and

of

whose certificates are hereunto annexed.

Sworn to before me, the
day of

18

}

(No. 3.)

(Judge's Certificate of Qualification.)

STATE OF NEW YORK, }
COUNTY OF , } ss:

I hereby certify that

, of

is personally known to me as a reputable Physician, and is possessed of the qualifications required by Chapter 446 of the Laws of 1874.

N. B. The above certificate is good until either revoked by the court granting it, or the disqualification of the holder by some act of his

own. It should not be printed upon the same page as the medical certificate, as it is a thing entirely distinct from it.

OFFICE OF THE STATE COMMISSIONER IN LUNACY, }
 ROSLYN, QUEENS Co., N. Y., May 15, 1874. }

The foregoing (1, 2 & 3) are the forms prescribed by me under title 1, article 1, sec. 2 of chapter 446 of the Laws of 1874.

JOHN ORDRONAU, }
State Commissioner in Lunacy.

(No. 4.)

(Petition to State Commissioner in Lunacy in behalf of person illegally confined in an asylum.)

STATE OF NEW YORK, } ss.
 COUNTY OF , }

To the Hon. JOHN ORDRONAU, *State Commissioner in Lunacy* :

The petition of , in the County of , respectfully shows, that as he is informed and verily believes, *John Doe*, of , in the County of , is now and has been confined as an alleged lunatic in (here state the asylum) for the past (here state length of time) . And that the following are the facts relating to his case to the best of your petitioner's knowledge, viz. :

(Here give history of the case.)

And your petitioner firmly believing that said *John Doe* is not now insane, and, therefore, not a proper person to be confined in any Insane Asylum, respectfully prays that proceedings in the nature of a *melius inquirendum* may be instituted by you to determine whether such confinement be any longer lawful and according to the Statute in such case made and provided.

Sworn to before me, this }
 day of 18 . }

(No. 5.)

(Subpœna of Commissioner in Lunacy.)

THE PEOPLE OF THE STATE OF NEW YORK,

To

GREETING:

WE COMMAND YOU, That all business and excuses being laid aside, you and each of you appear and attend before me,

JOHN ORDRONAU, *State Commissioner in Lunacy*,
pursuant to Section 4, of Title 10, of Chapter 574
of the Laws of 1875, on the

[L. S.] day of , at o'clock in the
noon, at ,
there to testify and give evidence in a certain inquiry
now pending before me relating to ,
and then and there to be entered upon.

And for a failure to attend you will be deemed guilty of a contempt
of Court and subject to such penalty as may be provided by law.

Witness my hand and seal of office at Roslyn, Queens County, this
day of

State Commissioner in Lunacy.

(No. 6.)

(*Order of Commissioner to Superintendent of Asylum to discharge an
improper patient.*)

STATE OF NEW YORK. }
COUNTY OF , } ss:

To the Superintendent of :

Whereas it has been made to appear to my satisfaction, both by
testimonial evidence as well as by a personal examination of *John
Doe*, now confined and in your custody at , by virtue
of a commitment in lunacy dated , that he the
said *John Doe* is not now insane nor a proper person for care and
treatment at your asylum, under chapter 446 of the laws of 1874.

Now, therefore, we command you in the name of the PEOPLE OF
THE STATE OF NEW YORK and by virtue of the power and authority
vested in our office by law, that you discharge him, the said *John Doe*,
herewith from your asylum, and allow him to depart without let or
hindrance by you or your servants.

Witness my hand and seal of office at , this
day of , 18

[L. S.]

State Commissioner in Lunacy.

(No. 7.)

(General order of Commissioner in Lunacy.)

THE PEOPLE OF THE STATE OF NEW YORK.

To

Whereas, it has been made to appear to me, as well by testimonial evidence as by a personal inspection of your asylum, that there is need of (*more attendants, or a better dietary, or more bedding, or clothing, or more heating of rooms, or better ventilation, etc., etc.*) in your said asylum; and whereas for such purpose it is necessary that the following (*changes, or additions, or reforms*) be made, viz.:

Now, therefore, in the name of the People of the State of New York, and by virtue of the power and authority vested in our office by law, we command you that you cause such (*changes, additions or reforms*) to be carried into effect within days from the date hereof, and that you also make due return and report in writing to me, at my office, in within days from the date hereof, of the manner in which this order has been executed by you.

Witness my hand and seal of office at , this day of , 18 .

[L. S.]

State Commissioner in Lunacy.

(No. 8.)

(Commission from Governor to inquire into mental sanity of person under sentence of death.)

STATE OF NEW YORK, }
EXECUTIVE CHAMBER, ALBANY, , 18 . }

By virtue of the power vested in me under chapter of the Laws of 1876, I, , Governor of the State of New York, hereby appoint I. T. of ; C. D. of ; and A. B. of , a committee to examine T. S., a person now confined in the County Jail of

County, under conviction for an offense for which the punishment is death, with reference to the question of his mental sanity at this time. And in case the said commission shall find the said

(No. 10.)

(*Commission to inquire into mental sanity of a prisoner indicted and arraigned at Oyer and Terminer and who pleads insanity as his sole defense.*)

STATE OF NEW YORK, }
COUNTY. }

OYER AND TERMINER.

The People }
vs. } *On Indictment for*
John Doe. }

At a Court of Oyer and Terminer held in and for the county of
at the Court House in on the
day of 18

Present—The Hon
“ and

, *Presiding Justice.*

the above-named prisoner, John Doe, having been duly arraigned, offers through , his counsel, the plea of insanity as his sole defense to said indictment.

Whereupon the court having received the said plea, and caused the same to be recorded, hath of its own motion appointed
and a Commis-
sion to examine the said John Doe with reference to his mental sanity at the date of the offense with which he stands charged, and to report their findings and conclusions thereon to the court, at as early a day as may be practicable.

P. J.

[L. S.] Attest

Clerk.

(No. 11.)

(*Report of Commission appointed at Oyer and Terminer or under Governor's warrant.*)

STATE OF NEW YORK, }
COUNTY. }

OYER AND TERMINER.

The People }
vs. } *On Indictment for*
John Doe. }

To the Hon.

, *Presiding Justice.*

The undersigned, a commission appointed by this honorable court

asylum by order of _____ on the _____ day of _____
 18 _____, (*here recite terms of order*) and has remained under
 observation and care until this time, is now, in my opinion, restored to
 his right mind, and I do hereby certify to the same.

Supt.

(No. 13.)

Certificate of fitness for discharge of Insane Convict.)

STATE OF NEW YORK, }
 STATE ASYLUM FOR INSANE CRIMINALS, }
 AUBURN, N. Y., 18 . }

I hereby certify that the person whose name and description are
 hereunto annexed, having been held as a patient in this asylum for
 the space of _____ and continuing to be insane and manifestly
 incurable at the expiration of the term for which he was sentenced,
 and being also quiet and harmless, and in a condition to be rendered
 comfortable in (*a county alms-house or asylum*) is, in my opinion, a
 fit and proper subject for discharge under the statute.

Med. Superintendent.

JOHN SMITH.....Aged 25 years. Erie County.
 Burglary, Sept. 18, 1874, 3
 years. Sentence expired Sept.
 18, 1877. Demented. Quiet.
 Neither homicidal nor suicidal.

(Approval by State Comm'r in Lunacy.)

STATE OF NEW YORK, }
 OFFICE OF THE STATE COMM'R IN LUNACY, }
 18 . }

It appearing from the within certificate of _____, Super-
 intendent of the State Asylum for Insane Criminals, that JOHN SMITH,
 now a patient therein, is a fit subject for discharge under the statute,
 I hereby approve of the same.

Witness my hand and seal of office the day and year
 [L. s.] _____ hereinbefore written.

State Comm'r in Lunacy.

(No. 14.)

(Certificate of the State Commissioner in Lunacy to Justice of Supreme Court of restoration to reason of the insane criminal.)

STATE OF NEW YORK, }
COUNTY, } ss :

BEFORE THE STATE COMMISSIONER IN LUNACY.

In the Matter }
of }
John Doe. }

To the Hon. Justice of the Supreme
Court of the Judicial District.

Whereas, it has been certified to me by Dr. _____,
Superintendent of the _____ asylum, that *John Doe*,
who was (*indicted for*) _____ (*or acquitted of the crime of* _____,
upon trial) before a court of _____ held in and for
the county of _____, at _____, on the _____ day of _____,
18 _____, and committed by order of the Hon. _____

_____, presiding judge thereof, to the _____ Asylum
on the _____ day of _____, 18 _____, (*and transferred [if he has
been] to _____ Asylum on the _____ day of _____, 18 _____*),
is now restored to his right mind. And, whereas, after having made
due inquiry into the truth of such fact, and after a personal examina-
tion of said *John Doe*, I am satisfied that the same is well founded
and substantially established by competent evidence.

Now, therefore, pursuant to the statute in such cases made and
provided, I, JOHN ORDRONAU, State Commissioner in Lunacy, do
hereby certify and make known that, in my opinion, the said *John
Doe* is of sound mind and understanding and not laboring under any
form of mental disorder.

Witness my hand and seal of office at _____, this
day of _____, 18 _____.

[L. S.]

State Commissioner in Lunacy.

(No. 15.)

(Order of Judge discharging criminal when restored to reason.)

STATE OF NEW YORK. }
SUPREME COURT. }
COUNTY. }

In the Matter }
of }
John Doe. }

On reading and filing the within certificate of JOHN ORDRONAU,
State Commissioner in Lunacy, certifying that *John Doe*, who was

committed to the _____ Asylum on the _____ day
of _____, 18____, is now restored to his right mind, and
the same being proved to my satisfaction,

Ordered that the said *John Doe* be and he is hereby discharged from
the custody of the said _____ Asylum.

Dated at _____, this _____ day of _____, 18____.

Justice of Supreme Court.

Attest.

Clerk.

HABITUAL DRUNKARDS.

(No. 16.)

(Designation of drunkards, and notice to tavern-keepers.)

COUNTY OF _____, ss.

The undersigned, overseers of the poor of the town of _____,
in said county, having discovered A. B., of said town, to be an
habitual drunkard, do hereby, pursuant to section 1, title 4, chapter
20, part 1, of the Revised Statutes, designate him as an habitual
drunkard, and describe him as follows: [*here describe him.*] And
every merchant, distiller, shop-keeper, grocer, tavern-keeper, or other
dealer in spirituous liquors, is required not to give or sell, under any
pretense, any spirituous liquors to the said A. B.

Given under our hands, at _____, this _____ day of _____, 18____.

C. D.,

E. F.,

Overseers of the Poor.

[Copies of the foregoing notice, signed by the overseers, should be
directed to and served personally on all persons who are required to
obey its directions. The person designated as a drunkard may con-
test the fact before a jury. For that purpose, he must apply to a
justice of the peace of his town for a venire. Upon such application,
the justice is required to give immediate notice to the overseers of the
poor, of the time and place which he shall fix upon to try the ques-
tion; and to issue a venire.]

(No. 17.)

(Form of notice to overseers.)

To the overseers of the poor of the town of _____:

You are hereby notified that A. B., who has been designated by

you as an habitual drunkard, has applied to me for process to summon a jury, and try and determine the fact of such drunkenness; and that I have fixed upon the day of instant, at o'clock in the afternoon, at my office in said town, as the time and place for such trial.

Dated , 18 .

J. K., *Justice of the Peace.*

(No. 18.)

(*Form of Venire.*)

COUNTY OF , ss :

To any constable of the town of , in said county,
GREETING :

You are hereby commanded, in the name of the people of the State of New York, to summon a jury of twelve persons, competent to serve as jurors, to appear at my office in aforesaid, on the day of inst., at o'clock in the afternoon, to try the fact whether A. B., of said town, is an habitual drunkard, he having been designated as such by the overseers of the poor of said town; and have then and there a panel of the names of the jurors you shall so summon, and this precept.

Given under my hand, at , this day of , 18 .

J. K., *Justice of the Peace.*

[Witnesses may be summoned and sworn, and their testimony enforced in the same manner as in justices' courts.]

(No. 19.)

(*Form of Subpœna.*)

COUNTY OF , ss :

To John Doe, Richard Roe, etc., GREETING :

You are hereby commanded, in the name of the people of the State of New York, to appear before me, the undernamed justice of the peace, at my office, in the town of , in said county, on the day of inst., at o'clock in the afternoon, to give evidence touching the fact of the habitual drunkenness of A. B.; he having been designated by the overseers of the

poor of said town as an habitual drunkard, and the said A. B. having demanded a jury to try such alleged fact.

Given under my hand, at _____, this _____ day of _____, 18 ____.

J. K., *Justice.*

[The jury are to be summoned, returned, and six balloted for as in suits in justices' courts. The six drawn must be sworn and sit as a jury.]

(No. 20.)

(Drunkard—Juror's oath in case of.)

You do swear that you will well and truly try the fact of the alleged habitual drunkenness of A. B., and a true verdict give according to evidence.

(No. 21.)

(Drunkard—Oath to witness in case of.)

You do swear that the evidence you shall give, touching the fact of the alleged habitual drunkenness of A. B., shall be the truth, the whole truth, and nothing but the truth.

[The verdict of the jury must be entered by the justice in a book provided by him for the purpose. If it be found that the person designated is an habitual drunkard, the justice must enter judgment against him, and award execution for the costs to the overseers of the poor, as in civil cases.]

(No. 22.)

(Drunkard—Execution against.)

COUNTY OF _____, ss :

To any constable of said county, GREETING :

Whereas, A. B., of _____, in said county, was designated and described by the overseers of the poor of said town as an habitual drunkard; and by the verdict of a jury, duly impaneled, drawn and sworn, before me, the undersigned justice, upon the application of the said A. B., it is found that he is an habitual drunkard; whereupon I did render judgment against said A. B. for the costs of the said overseers in attending the trial, amounting to the sum of

dollars. You are therefore hereby commanded, in the name of the people of the State of New York, to levy the said costs of the goods and chattels of the said A. B. (excepting such goods and chattels as are exempt by law from execution), and bring the money which you shall collect, _____ days from the date hereof, before me, at my office in _____, to render to said overseers; and if no such goods and chattels, or not sufficient to satisfy this execution, can be found, you are further required to take the body of the said A. B. and convey him to the common jail of said county, there to remain until this execution be paid, or he be thence discharged according to law.

Given under my hand, at _____ this _____ day of _____, 18 ____.
J. K., *Justice of the Peace.*

(No. 23.)

(Execution against the overseers.)

COUNTY OF _____, ss:

To any constable of said county, GREETING:

Whereas, A. B., etc., having been tried before me on the charge of being an habitual drunkard, on the _____ day of _____, it is found that he is not an habitual drunkard; and inasmuch as it appears to me that the said overseers of the poor did not act in good faith, and that they had no reasonable cause to believe the said A. B. to be an habitual drunkard, I have entered judgment against the said overseers of the poor for the costs of said A. B., amounting to the sum of _____ dollars. You are therefore commanded, in the name of the people of the State of New York, to levy the said costs, etc. [*Draw the residue of the execution as in ordinary cases.*]

J. K., *Justice of the Peace.*

(No. 24.)

(Revocation by the overseers when a drunkard reforms.)

COUNTY OF _____, ss:

The undersigned, overseers of the poor of the town of _____, being satisfied that A. B., respecting whose drunkenness a notice has heretofore been given by the overseers of the poor of said town, has reformed and become temperate, hereby revoke and annul the notice given in the case of the said A. B., aforesaid.

Given under our hands, at _____, this _____ day of _____, 18 ____.
C. D.,
E F.,

Overseers of the Poor.

COMMITMENT TO THE STATE INEBRIATE ASYLUM.

(No. 25.)

(Form of certificate of County Judge.)

IN THE MATTER OF } Before
AN ALLEGED INEBRIATE. } of County Judge County.
COUNTY, ss:

Whereas, application in writing has been made to me,
, county judge of the county of
, by
, one of the superintendents of the poor of
said county, in behalf of
of the town (or city)
of
, in the county aforesaid, an alleged inebriate
in indigent circumstances, to the end that an investigation of the facts
of the case might be had, and if, upon such investigation, it should
seem proper that the requisite certificate might be made in pursuance
of section 17 of chapter 652 of the Laws of 1873, entitling said

to admission into the New York State Inebriate Asylum at Binghamton, as an inebriate in indigent circumstances; and I, the said county judge, having made the requisite order for such investigation, dated on the day of , and appointed the day of at , for the hearing said matter, and directed reasonable notice to be given to one of the superintendents of the poor of the county of , and to the said , of the time and place of such hearing and investigation; and , one of said superintendents, having personally appeared before me at the time and place aforesaid, and proof of the personal service of notice of the time and place of said investigation upon said having been made, and having called two respectable physicians, and other credible witnesses, and fully investigated the facts of the case: I do hereby certify that satisfactory proof has been adduced before me, showing that the said is an inebriate; that his estate is sufficient to support him (or him and his family, as the case may be,) and that he will probably reform under treatment in said asylum.

Given under my hand, at _____, in the county of _____, this
day of _____ 18 ____.

County Judge.

(To this must be attached the certificate of the county clerk, with the seal of the county courts, as follows:)

(No. 26.)

STATE OF NEW YORK, }
COUNTY. } ss:

I, _____, clerk of the county of _____ and of the courts thereof, do hereby certify that _____, whose name is subscribed to the foregoing certificate, was, at the date of said certificate, county judge of the county of _____, duly elected and sworn and authorized to make such certificate; that I am well acquainted with the handwriting of the said _____, and verily believe that the signature to the said certificate is genuine. In testimony whereof I have hereunto set my hand and affixed the [L. S.] seal of said county and courts at _____ in said county of _____, the _____ day of _____, 18 _____.

County Clerk.

INEBRIATES' HOME FOR KINGS COUNTY.

Forms for commitment and admission to this institution.

(No. 27.)

(Involuntary Patients.)

When the inebriate declines to enter the Home voluntarily, the nearest relatives may proceed under the provisions of Section 2 of Chapter 797 of the Laws of 1873, which read as follows :

"For the further purpose of carrying out the object of said Inebriates' Home for Kings County, the magistrates of the several counties of this State may, upon presentation to them of a requisition from the nearest relative or relatives, guardian or friend of any person who has been duly committed to the jail or other prison within their respective jurisdictions as an habitual drunkard, together with a certificate from the Chairman of the Executive Committee, stating that said Committee is willing to admit and retain in custody such person so committed as an habitual drunkard, may so modify such order of commitment as to permit any authorized agent of said Home to take charge of said habitual drunkard and transfer him or her directly to said Institution, there to be detained pursuant to the provisions of the second section of the Act of Incorporation of said Home, passed May 9, 1867, provided always that the relatives, guardian or friends shall alone be liable for the expense of his or her removal to and maintenance in said Home."

It will be observed that the trial before the magistrate, together with the conviction as an habitual drunkard, and the commitment to prison, must be perfected according to the forms of law. Then come the proceedings for transfer to the Home, in which the following forms may be used:

(No. 28.)

(Warrant of Commitment.)

STATE OF NEW YORK, }
COUNTY, TOWN OF } ss.:

To any Constable of said County, and to the Keeper of the
of the said County, GREETING:

Whereas, has this day been duly convicted before me,
a justice of the peace in and for the said town and county,
upon the complaint on oath of , and upon competent testi-
mony, of being at the present time an habitual drunkard in said town
and county and

Whereas, upon such conviction, I did adjudge and determine that
the said be committed to the of said county for
the term of

Now, therefore, In the name of The People of the State of New
York, you, the said constable, are hereby commanded forthwith to
convey and deliver the said into the custody of the said
keeper of said , who is hereby commanded to receive and
detain h therein during the term of , or until thence
discharged by due course of law.

Given under my hand, at the said town, in the said county, this
day of , 187 .

, *Justice of the Peace.*

(No. 29.)

(Requisition of Nearest Relatives, etc.)

STATE OF NEW YORK, }
COUNTY. } ss.:

being sworn, do depose and say that* the of
 , who was duly committed to the of the
as an habitual drunkard, by , Esq., in and for the
by a warrant of commitment dated the day of

* Insert, "he (or she) is the nearest relative," or "friend," as the case may be.
If the requisition is made by more than one, insert "they are, etc."

187 , for the term of , and that the deponent hereby make requisition upon said magistrate, in accordance with the provisions of the statute, and prays that the said warrant of commitment may be so modified as to permit any authorized agent of The Inebriates' Home for Kings County, to take charge of said habitual drunkard, and transfer h directly to said Institution, there to be detained pursuant to the provisions of the second section of the Act of Incorporation of said Home, passed May 9, 1867, provided that the relatives, guardian , or friends shall alone be liable for the expense of such removal to and maintenance in said Home.

Sworn to before me, this day of , 187 .

(No. 30.)

(Certificate of Consent.)

I Chairman of the Executive Committee of The Inebriates' Home for Kings County, in pursuance of the provisions of Section 2 of Chapter 797 of the Laws of 1873, hereby certify that the committee is willing to admit and retain in custody in said Home , who was committed to the of the on the , 187 , as an habitual drunkard, for the term of , provided that the relatives, guardian, or friends of such person shall alone be liable for the expenses of such removal to and maintenance in said Home.

And I also certify that is an agent of said Home, duly authorized to take charge of said person and transfer h to said Institution.

Chairman of the Executive Committee of the Inebriates' Home for Kings County.

Dated, , 187 .

(No. 31.)

(Modified Order of Commitment.)

STATE OF NEW YORK, }
COUNTY. } ss :

Whereas, was duly convicted before me, , on the day of , 187 , upon complaint, duly made on oath, and upon competent testimony, of being an habitual drunkard, in said county ; and

Whereas, upon such conviction, I did adjudge and determine that
be committed to the of said county for the term
of ; and

Whereas, the said _____ was thereupon duly committed to the said _____, for the said term, by a warrant of commitment signed by me, and dated on the day above mentioned; and

Whereas, requisition has this day been presented to me from the _____ of said person, to wit, by _____, in accordance with the provisions of Section 2 of Chapter 797 of the Laws of 1873, and also a certificate from the _____ Chairman of the Executive Committee of The Inebriates' Home for Kings County, stating that said Committee is willing to admit and retain in custody in said Home the said person so committed as an habitual drunkard, subject to the provisions of said section of said chapter, and stating that _____ is an agent of said Home, duly authorized to take charge of said person and transfer h _____ to said Institution.

Now, therefore, I do hereby modify the said warrant of commitment, so as to permit the said agent, hereinbefore named, to take charge of said habitual drunkard, and transfer him directly to the said Inebriates' Home for Kings County, there to be detained, pursuant to the provisions of the second section of the Act of Incorporation of said Home, passed May 9, 1867, provided that the relatives, guardian or friends shall alone be liable for the expenses of such removal to and maintenance in said Home.

Given under my hand this day of , 187 .

Or proceedings may be taken under Section 6, Chapter 169, Laws of 1877, inserted above. This avoids the necessity of a commitment to the penitentiary or workhouse, and its subsequent modification, by providing for a direct commitment to the Home upon the presentation of the requisite certificate ; and it also makes provision for the indigent poor. The following forms are drawn pursuant to this section.

(No. 32.)

(Certificate of Chairman of Executive Committee.)

To _____, Esq., Justice :

having this day been duly convicted before you of
being an habitual drunkard,

Now, therefore, I, _____, Chairman of the Executive Committee of The Inebriates' Home for Kings County, in pursuance of Section 6 of Chapter 169 of the Laws of 1877, do hereby certify that the said Committee is willing to admit and retain the said _____ in custody in said Home for the term of six months.

Dated, _____, 187 .

(No. 33.)

(Warrant of Commitment.)

STATE OF NEW YORK, }
COUNTY OF . } ss :

To any Constable or Police Officer of said County and to the Keeper of the Inebriates' Home for Kings County, GREETING :

Whereas, has this day been duly convicted before me, , a magistrate in and for said , upon complaint and oath of , and upon competent testimony, of being at the present time an habitual drunkard in said ; and

Whereas a certificate, in pursuance of Section 6 of Chapter 169 of the Laws of 1877, being duly presented to me, I did, by virtue of said section, adjudge and determine that the said be committed to The Inebriates' Home for Kings County for the term of months;

Now, therefore, in the name of the People of the State of New York, you, the said constable or police officer, are hereby commanded forthwith to convey and deliver the said into the custody of the said Keeper of said Home, who is hereby commanded to receive and detain the said therein during the said term of months, or until thence discharged by due course of law.

Given under my hand at , this day of , 187

(No. 34.)

(Voluntary Patients.)

Section 2 of Act incorporating the Home, passed May 9, 1876, provides as follows:

“The said corporation shall have power to receive and retain all inebriates who enter said Home, either voluntarily or by order of the Trustees, as hereinafter provided, for such period as said Trustees may deem for the benefit of such inebriates, not exceeding six months.”

Voluntary applicants for admission may submit their request in the following form:

To the Superintendent of The Inebriates' Home for Kings County:

SIR:—Having unfortunately indulged in the use of until such practice has become a confirmed habit, which I cannot control, and which I feel powerless to overcome without assistance, and being convinced that such aid can only be obtained by submitting myself to restraint, I hereby voluntarily apply for admission as a patient to “The Inebriates' Home for Kings County,” stipulating that if I am received into said Institution, I will remain a

patient therein for such time as the officers thereof shall deem requisite for my benefit, not exceeding the term of six months; and pay, or cause to be paid, to said Institution three months' board in advance, at such rate as may be agreed upon; promising to obey all the rules, regulations and orders that may be in force in said institution at any time during my residence therein, and to submit to such restraint and treatment as the Superintendent thereof may deem necessary in my case.

(Proceedings in Supreme or County Court.)

Where poverty is involved, or where the habitual drunkard has become dangerous to himself or others, it may be advisable to proceed by petition to the Supreme or County Court for a commission in the nature of a writ "de lunatico inquirendo," for the purpose of having a committee appointed to take charge of the inebriate's person and estate. In such cases where immediate restraint is necessary, the statute (see Section 7, chapter 483, Laws of 1868,) provides for a temporary commitment to the Home, as follows:

"Any Justice before whom proceeding may be pending under the provisions of this act may, after filing of any complaint and when in his judgment the circumstances of the case render it proper so to do, commit the person charged with being an habitual drunkard to the said 'Home' while proceedings in such complaint are pending, and all persons so temporarily committed shall be discharged from said 'Home' if, on return of a commission, it shall be determined that they are not proper persons to be detained."

In this proceeding the following form of temporary commitment may be used:

(No. 35.)

(Temporary commitment pending proceedings in supreme or county court.)

STATE OF NEW YORK, } ss:
COUNTY. }

At a term of the Court of the of ,
held at the in the on day of , 187
Present, Hon. , Justice. In the matter of , a
supposed habitual drunkard.

To any Constable or Officer of Police doing duty within any
County, Town or City within this State:

Whereas, petition and complaint has been made to me, and is now filed, wherein and whereby it appears to me that _____, a resident of the _____ of _____, is incapable and unfit to properly conduct his own affairs, in consequence of habitual drunkenness; and

Whereas, in my judgment the circumstances of the case render it fit and proper that he be committed to The Inebriates' Home for Kings County while proceedings on such complaint are pending;

Now, therefore, under and by virtue of Chapter 483 of the Laws of 1868, and other laws amendatory thereof and supplemental and additional thereto, you are commanded forthwith to take the said _____ and him convey to the said Inebriates' Home for Kings County, the Keeper whereof is hereby required to receive and detain him therein while proceedings above referred to are pending, and until further order in the premises.

Given under my hand, at the said _____ of _____, this _____ day of _____, A. D. 187____.

In cases where these proceedings have been consummated, and the fact of habitual drunkenness duly determined, the statute (see Section 3, Chapter 797 of Laws of 1873) makes the following provision:

"§ 3. Section three of the act to amend the act entitled 'An Act to Incorporate The Inebriates' Home for Kings County,' passed May ninth, eighteen hundred and sixty-eight, is hereby amended so as to read as follows:"

"The Justices of the Supreme Court of the State of New York, in the exercise of their several jurisdictions, and the County Judges of the several counties of this State, within the limits of their several jurisdictions, shall have power to commit to said Inebriates' Home for Kings County, for a term not exceeding one year, all persons who, in accordance with the provisions of sections four, five and six of this act, as amended, shall be found incapable or unfit to properly conduct their own affairs, or dangerous to themselves or others, in consequence of habitual drunkenness, on the presentation to the Justice or County Judge making such commitment of an agreement on the part of the Executive Committee of said Home, certified by the Chairman thereof, to receive and treat such habitual drunkard in said Home, and not otherwise."

Blanks of the above forms may be had on application to the Superintendent of the Institution, at Fort Hamilton, Kings county, N. Y.

*By Chapter 797, Section 1, of Act passed June 18, 1873, the words "Executive Committee" are substituted for that of "Trustees."

INDIGENT LUNATICS, NOT PAUPERS.

(No. 36.)

(Application to county judge and affidavit in behalf of.)

To the Hon. A. B., county judge of the county of

The petition of C. D., of the town of _____, in said county, respectfully sheweth: That E. F., now a resident of the said town, is, and for the term of _____ years last past has been a lunatic; that he is now in the care and custody of G. H., at the town aforesaid; that he is in indigent circumstances, and has no property in his own possession, or held by any person in trust for him, sufficient for his support [*or, for the support of himself and family*], under the visitation of insanity aforesaid. Your petitioner therefore prays that an examination and investigation may be had in the premises, pursuant to the provisions of the act entitled "An act to organize the State Lunatic Asylum, and more effectually to provide for the care, maintenance and recovery of the insane," passed April 7, 1842, etc.

C. D.

COUNTY OF _____, ss:

C. D., of said county, being duly sworn, says that the facts and circumstances stated and set forth in the foregoing petition, by him signed, are true.

C. D.

Subscribed and sworn before me, }
 the _____ day of _____, 18____, }

_____, Justice.

[Upon receiving such petition, it is the duty of the county judge to call two respectable physicians, and other credible witnesses, and investigate all the facts of the case. For the purpose of procuring the attendance of the physicians and witnesses, the following forms of an order and subpoena may be used.]

(No. 37.)

(Order of judge on the foregoing petition.)

In the matter of E. F., an alleged }
 indigent lunatic: }

Upon the petition of C. D., of the town of _____, in the county of _____, herein presented to me, and duly verified, it is ordered: That J. T. P. and D. D., two respectable physicians of the said county, be hereby designated and appointed, pursuant to the

provisions of the act entitled, etc. [*as in the next preceding form*], to examine the said E. F., in respect to his alleged insanity, within days after they shall be respectively served with a copy of this order, certified by me; and that they appear before me at my office in _____, on the _____ day of _____ instant [*or, next*], at o'clock in the _____ noon, and certify _____ respective opinions in relation thereto; and that, at the time and place aforesaid, other witnesses be examined touching the mental condition and pecuniary circumstances of the said E. F. And it is further ordered that days' notice of such examination be given to one of the overseers of the poor of said county [*or to one of the overseers of the poor of the town of _____, if such expense is chargeable to the town.*]

A. B.,

County Judge of the county of _____.

[The notice to the superintendent or overseer may be for such time as the judge may deem reasonable.]

(No. 38.)

(*Subpœna to witnesses.*)

COUNTY OF _____, ss.:

To E. F., O. P., etc., of said county, GREETING:

You, and each of you, are hereby commanded, in the name of the People of the State of New York, to appear before me, at my office in _____, on the _____ day of _____ instant [*or, next*], at o'clock in the _____ noon, to testify what you, or either of you, may know touching the mental condition and pecuniary circumstances of E. F., now of the town of _____, in said county.

Given under my hand, at _____, this _____ day of _____, 18 ____.

A. B.,

County Judge, etc.

(No. 39.)

(*Certificate of physicians, and affidavit.*)

In the matter of E. F., an alleged }
indigent lunatic. }

We do hereby certify that, in pursuance of the order of A. B., county judge of the county of _____, made in the above entitled matter, and bearing date the _____ day of _____, 18 ____, we have carefully examined into the mental state and condition of E. F.,

above named, and particularly in reference to his alleged insanity; and that in our opinion, derived from such examination, the said E. F. is a confirmed lunatic.

Given under our hands, this day of , 18 .
J. T. P.,
D. D.

COUNTY, ss :

J. T. P and D. D., of said county, being by me severally sworn, depose and say, and each for himself deposes and says, that the facts stated and set forth in the foregoing certificate, by them signed, are true.

J. T. P.,
D. D.

Subscribed and sworn to before me, }
 this day of , 18 . }
, Justice.

(No. 40.)

(*County Judge's certificate.*)

In the matter of E. F., an alleged }
 indigent lunatic : }

COUNTY OF , ss. :

Whereas, an application has been made to me , county judge of the said county of , in behalf of E. F., who resides in the town of , in said county, for a certificate entitling him to admission into the State Lunatic Asylum at Utica, as a person in indigent circumstances, not a pauper; and I, the said judge, having given reasonable notice of the time and place of hearing, to , superintendent of the poor of the county of , which county is chargeable with the expense of supporting said person in the asylum [*or, to* , an overseer of the poor of the town of , in the county of , which county is chargeable with the expense of supporting said person in the asylum]; and having called two respectable physicians, and other credible witnesses, and fully investigated the facts of the case [if a jury is called on the question of insanity, state the fact and the verdict], do hereby certify that satisfactory proof has been adduced to me, showing the said E. F. to be insane, and that he became insane within one year next prior to the date hereof, and that his estate is

(No. 42.)

(Private patient—agreement for the support of, and removal.)

Whereas, _____, of the town of _____, in the county of _____, an insane person, has been admitted as a patient into the New York State Lunatic Asylum at Utica: Now, therefore, we, the undersigned, in consideration thereof, do agree with and bind ourselves to _____, the treasurer of the said asylum, to pay to him and his successors in office the sum of _____ dollars and _____ cents per week, for the care and board of said insane person, so long as _____ shall continue in the said asylum, with such extra charges as may be made or directed by the superintendent of said asylum, by reason of _____ requiring more than ordinary care and attention; and also to provide _____ with suitable clothing, and to pay for all such necessary articles of clothing as shall be procured or ordered for _____ by the said superintendent or other officer of the asylum; and to remove _____ from the asylum whenever the room occupied by _____ shall be required for a patient, or patients, having preference by law, or whenever requested so to remove _____ by the superintendent; and if _____ shall be removed by the request of _____ friends, contrary to the advice of the said superintendent, before the expiration of six calendar months after reception, then we agree to pay board, at the price above mentioned, for twenty-six weeks, including all extra charges, for the time _____ has remained in the asylum; and also to pay all damages (not exceeding fifty dollars) that _____ may do to the furniture, buildings, or other property of the asylum; for all reasonable charges and expenses in case of elopement, and funeral charges, in case of death. All such payments to be made semi-annually, on the first days of February and August, and at the time of discharge, death or removal, with interest on each bill from the time of its becoming due.

In witness whereof, we have hereunto set our hands and seals this _____ day of _____, eighteen hundred and _____

(No. 43.)

(Certificate as to the pecuniary responsibility of the parties signing the foregoing agreement.)

I, _____, county judge of the county of _____
[or, treasurer of the county of _____, or, supervisor of the
town of _____, in the county of _____, or, president
or cashier of the _____ bank, in the town of _____], do
certify that I am well acquainted with _____, who
have signed the within agreement, and am also acquainted with their
pecuniary circumstances, and, in my opinion, each of them is abund-
antly able to meet and pay promptly all sums which may at any time
become due upon and by virtue of said agreement.

Dated, _____, 18 ____.

FORMS IN EQUITY.

(No. 44.)

(Petition for a commission de lunatico.)

STATE OF NEW YORK—SUPREME (or other) COURT:

In the Matter of John Doe, a person of sup- posed unsound mind.	}	*
--	---	---

To the Supreme Court, or (*other court*).

The petition of _____, in the county of _____, respectfully shows, that John Doe, of _____, in the county of _____, and who is (*if a relative state what*), has been for more than (*state the time*) so far disturbed in the use of his mental faculties, as to be unable to govern himself or to manage his affairs with safety to his own interests, all which facts will more fully appear by the affidavits hereunto annexed. And your petitioner further shows that the said John Doe is the owner of property situated within this State, as will also more fully appear by the affidavits hereunto annexed.

Your petitioner therefore prays that a commission of lunacy †may issue out, and under the seal of this court to inquire of the apparent lunacy of the said John Doe, and to be directed for execution to such persons as the court may select.

(Signature.)

(Here affix verification of the petition before a competent officer.)

*The term "*unsound mind*," like its synonym *non compos mentis*, is generic in law, and includes every form of mental impairment whether produced by *insanity*, *sickness*, *old age*, or *habitual drunkenness*. It excludes of course *idiocy*. No *special* form of petition, therefore, is needed for any of the above varieties of mental impairment. It is sufficient to state the facts connected with such impairment and its evident cause, so far as known. All which may be done under the form given above. A commission of *idiocy* has no proper existence in our law. For an idiot is one born so. Every one has, consequently, known him and he has never enjoyed any civil rights. Like any infant he would have a guardian of the person and estate, rather than a committee.

†There are no *writs de lunatico inquirendo* now issued, either in England or here. It is useless to mention them in a petition for a commission.

(No. 45.)

(Affidavits to be annexed.)

(Same title as before.)

COUNTY OF

, ss :

John Smith, of _____, in said county, being duly sworn, deposes and says : (Here state relationship to supposed lunatic, and degree of acquaintance ; and any peculiar or striking facts in his speech, demeanor, and conduct which may have been observed, together with the impressions produced thereby, of the unfitness of the party to govern himself or to manage his property discreetly. State, also, whether deponent knows that the supposed lunatic has property, and if so, of what kind, within this State, and where located. Give all particulars possessed. There should be at least two affidavits, one of which should be from a reputable physician well acquainted with the supposed lunatic.)

(No. 46.)

(Petition of overseers of the poor for a commission against an habitual drunkard.)

(Same title as in No. .)

The petition of _____ respectfully shows that they are overseers of the poor of the town of _____, in the county of _____. That _____, who resides in said town of _____, is, and has been for the past _____ months, an habitual drunkard. *(Here describe party and his family, and their circumstances.)*

That said _____ is the owner of real estate, situated in _____ consisting of _____ *(here describe same,)* and also the owner of personal property, consisting of _____ *(here describe same,)* necessary for the carrying on of his business. That said real estate is worth about _____, and said personal property worth about _____.

And your petitioners further state that the said _____ for the past _____ months, by reason of his habitual drunkenness has been, and still remains wholly incapable of managing his business in a prudent way. That he is wasting his property, and is liable to be defrauded of the same, if allowed to exercise any control over it, in consequence of which, as your petitioners verily believe, his family are likely to become a charge upon the town in which they reside ; all which facts will more fully appear by the affidavits hereunto annexed.

Wherefore, your petitioners pray that a commission may issue to

such persons as to the court may seem proper, directing them to inquire into the fact of the habitual drunkenness of the said

(*Verification.*)

Overseers of the Poor.

Affidavits.

(Here annex affidavits in the same form as on petitions for a commission *de lunatico.*)

(No. 47.)

(*Order for a commission of idiocy, habitual drunkenness, or lunacy.*)

(Same title as in No 44.)

On reading and filing the petition of _____ of _____ bearing date the _____, and the papers thereto annexed, and on motion of _____, of counsel for the petitioner, it is ordered that a commission in the nature of a writ *de lunatico inquirendo* be issued out of and under the seal of this court, in the usual form, directed to counselor at law; _____, physician; and _____, gentleman, all of the county of _____, and authorizing them to inquire by a jury of the said county and of the neighborhood where the said resides, of the lunacy of the said _____, and that in the said writ be inserted a command to the sheriff of the said county of _____ requiring him to summon the requisite jury; and that the said commission be executed at, or in some convenient place near to the residence of the said _____; and that previous notice of the time and place of such execution be given to the said _____ and to the person or persons having the charge and care of him.

And it is further ordered that, upon the execution of said commission, the person or persons having the care or custody of said _____ do produce him before the said commissioners and jury to be inspected and examined by them whenever the said commissioners shall so demand.

And it is further ordered that, if personal service of a notice of this commission cannot be made upon the said _____, or his place of residence ascertained within the next ten days, that then the said commissioners may serve the same by publication in the manner provided by law.

(No. 48.)

(Commission to inquire of lunacy, habitual drunkenness or idiocy.)

The People of the State of New York to _____ of the county
 of _____, GREETING :

Know ye, that we have assigned you, or any two of you, to inquire
 by the oaths of good and lawful men of the county of _____
 whether _____ of _____ in said county, is a lunatic, with or
 [L.S.] without lucid intervals, *(or an idiot, or an habitual drunkard,)*
 by reason of which infirmity he is incapable of governing him-
 self, or of managing his affairs, and, if so, from what time such
 infirmity dates, and in what manner it has manifested itself. And
 whether while in such condition the said _____ has alienated any
 lands and tenements or not, and, if so, what lands and tenements, to
 what person or persons, when, where and after what manner ; and
 what lands and tenements, goods and chattels as yet remain to him ;
 of what value the lands and tenements alienated by him and those by
 him retained are ; and what the issues and profits thereof amount to
 by the year, and what is the value of his goods, chattels and per-
 sonal estate ; and who are the nearest heirs of the said _____ who
 will be entitled to his estate, in case of his death, and what is their
 age.

Wherefore we command you, or any two of you, that at a certain
 day and place, or at certain days and places, which you shall for that
 purpose appoint, you diligently make inquisition into the facts here-
 inbefore recited ; and that you cause reasonable notice of the time and
 place of execution of this commission to be given to the said _____
 and that you report the inquisition which you shall thereupon make,
 under your hands and seals, or those of any two of you, together
 with those of the persons by whom it shall be made, distinctly and
 plainly and without delay to our _____ court, together with this writ.

And we hereby command the sheriff of the county of _____ that
 at such times and places as you shall make known to him, he cause to
 come before you, or any two of you, so many and such good and law-
 ful men of his bailiwick as you shall direct, by whom the truth of the
 matters aforesaid may be the better inquired into.

Witness : _____ *(judge or justice,)* of the _____ court at
 the _____ day of _____, 18 .

_____, Clerk.

_____, Attorney.

Indorsed—"By the Court."

_____, Clerk.

Return to the commission—*(to be indorsed).*

The execution of the within commission appears in the schedule hereunto annexed.

Dated

Commissioners.

(Return to Commission.)

Commissioners.

(No. 49.)

(Precept to Sheriff to summon a jury.)

By virtue of a commission in the nature of a writ *de lunatico inquirendo*, issued out of and under the seal of the Court of _____, bearing date the _____ day of _____ instant, to us whose names are here underwritten, directed to inquire if _____ of _____, be a (*lunatic, or idiot, or habitual drunkard*) or not: these are to require you to cause to come and appear before us twenty-four honest and lawful men of the county aforesaid, and of the neighborhood where the said _____ resides, on the _____ day of _____, by ten o'clock in the forenoon of the same day, at the _____ in said _____, then and there upon their oaths to inquire of the (*lunacy, or idiocy, or habitual drunkenness*) of the said _____; and of all such matters and things as shall be given them in charge by virtue of said commission; and hereof fail not at your peril.

Given under our hands and seals the _____ day of _____ in the year one thousand eight hundred _____.

A. B., [L. S.]

C. D., [L. S.]

E. F., [L. S.]

Commissioners.

To the sheriff of the _____, county of _____:

(The return of the sheriff indorsed.)

The execution of this precept appears in the panel hereto annexed.

Sheriff.

Names of the jurors summoned to inquire, according to the tenor of the precept annexed. (Names of jurors.)

(No. 50.)

(*Notice to lunatic or habitual drunkard of executing commission.*)

(Title.)

Sir : Take notice, that a commission to inquire as to your alleged (*lunacy or habitual drunkenness*), issued out of and under the seal of the Court, and to us directed as commissioners, will be executed at the , in the of , on the instant, at ten o'clock, A. M.

Dated

Commissioners.

To

(No. 51.)

(*Notice to produce lunatic.*)

By virtue of a commission in the nature of a writ *de lunatico inquirendo*, issuing out of and under the seal of the Court of the of , bearing date , to us whose names are hereunto written directed, to inquire whether , of , be a (*lunatic or idiot or habitual drunkard*) or not, these are to require you to produce before us the said , at the execution of the said commission at the , on the instant, at ten o'clock in the forenoon, there to be examined touching the matters aforesaid; and you are to give him notice accordingly; as also to any other person or persons who are guardians of him, or trustees of his estate, that they may appear in his defense if they shall think fit.

Given under our hands and seals this day of

[L. S.]

[L. S.]

[L. S.]

Commissioners.

To
said

Esq., or any other person or persons as now have the
in their custody.

(No. 52.)

(Subpœna for witnesses on execution of commission.)

By virtue of a commission in the nature of a writ *de lunatico inquirendo*, issuing out of and under the seal of the Court of the of , bearing date , to us whose names are hereunder written directed, to inquire whether , of , and county of be a (*lunatic, or idiot, or an habitual drunkard*) or not, these are to require you that you, and each of you personally, be and appear before us at the execution of the said commission, at in said , on the day of , at ten o'clock in the forenoon, upon your several and respective oaths to testify the truth according to your knowledge, touching the (*lunacy or idiocy or habitual drunkenness*) of the said , and of all such matters as shall be demanded of you by virtue of the said commission. Thereof fail not at your peril.

Given under our hands and seals this day of

[L. S.]

[L. S.]

[L. S.]

Commissioners.

To and

(No. 53.)

(Oaths of jurors on execution of commission.)

You shall well and truly inquire, touching the (*lunacy, or idiocy, or habitual drunkenness*) of and of all such matters and things as shall be given you in charge by virtue of a commission issued out of, and under the seal of the Court of the of , to inquire into his said (*lunacy, or idiocy, or habitual drunkenness*) and now here to be executed, and a true inquisition make according to evidence, so help you God.

(No. 54.)

(Oaths of witnesses.)

You do solemnly swear that the evidence you shall give touching the (*lunacy, or idiocy, or habitual drunkenness*) of and as to who are his next of kin, and the nature, extent and value of his

real and personal estate, and all such other matters and things as shall be required of you, by virtue of a commission issued out of the Court of the of , to inquire into the said (*lunacy, or idiocy, or habitual drunkenness*) and now here to be executed, shall be the truth, the whole truth and nothing but the truth, so help you God.

(No. 55.)

(*Inquisition.*)

An inquisition taken at the , in the of , on the day of , before and commissioners appointed by virtue of a commission in the nature of a writ *de lunatico inquirendo*, issued out of, and under the seal of the Court of the of , bearing date , to them, the said commissioners directed to inquire, among other things, of the (*lunacy, or idiocy, or habitual drunkenness*) of upon the oaths of (insert names of jurors) good and lawful men of the said county, who being summoned, sworn and charged upon their oath, say that the said

at the time of making this inquisition, is a lunatic, and of unsound mind, and does not enjoy lucid intervals (*or is an idiot, or an habitual drunkard*) so that he is incapable of the government of himself, or of the management of his lands, tenements, goods and chattels; and that he has been in the same state of (*lunacy, or idiocy, or habitual drunkenness*) for the space of two years last past, and upwards, (or in case of idiocy from his nativity;) (that the said hath from sickness and infirmity of body became a lunatic, *or from intemperate drinking an habitual drunkard*), but how otherwise he became a lunatic, the jurors aforesaid know not. And the jurors aforesaid, upon their oaths aforesaid, further say that whether the said

being in that state hath alienated any lands and tenements, or not, the jurors aforesaid know not (or that the said being in that state, did on or about the day of , at , by a warranty deed, sell, alien and convey unto , a certain in said , belonging to him, the said , for the consideration of only dollars, which was less than a

of the actual value thereof; (the same being worth, at least, dollars.) And the jurors aforesaid, on their oaths aforesaid, do further say that the following lands and tenements goods and chattels, yet remain to him, the said to wit, (de-

scribe property,) and that the said lands and tenements now belonging to the said _____ are worth about the sum of _____ dollars, and that the issues and profits thereof, by the year, are worth _____ dollars, or thereabout. And further, that the value of the goods, chattels and personal estate of the said _____ is about _____ dollars. And the jurors aforesaid, upon their oath aforesaid, do further say that _____ the _____ of _____ of said city, is the _____ of the said _____ and that _____ is, at the time of taking this inquisition, of the age of twenty-five years or thereabouts; and that _____ of said _____, is a _____ of the said _____ and is, at the time of taking this inquisition, of the age of _____ years, or thereabouts; that the said _____ and _____ are the nearest heirs of the said _____ and will be entitled to his estate, in equal proportions, in case of his death.

In testimony whereof, as well the said commissioners as the jurors aforesaid have to this inquisition set their hands and seals, the day and year first above written.

(Names and seals of commissioners.)

(Names and seals of jurors.)

(No. 56.)

(Notice of motion to confirm finding of jury and to appoint committee.)

(Title of cause.)

Sir: Take notice, that I intend to move this honorable court at the next term thereof, to be held at the in the of , on the day of , at the opening of the court of that day, or as soon thereafter as counsel can be heard, for an order that the finding of the jury upon the commission heretofore issued in the above matter be confirmed; and that some suitable person be appointed a committee of the person and estate of the said ; and for such other or further order or relief as the court may think proper to grant. Which motion will be founded on the said commission, the return thereto, and the inquisition taken under such commission.

Dated

Yours, etc.,
Attorney.

To (or whoever opposes the application.)

(No. 57.)

(Order confirming the finding of the jury, and appointing committee.)

At a special term, etc.

(Title.)

On reading and filing the inquisition in this matter, taken under and by virtue of a commission heretofore issued out of this court, from which it appears that the jury have found the said is a lunatic, and of unsound mind, and does not enjoy lucid intervals, *(or that he is an idiot or an habitual drunkard)* so that he is incapable of the government of himself, or of the management of his lands, tenements, goods and chattels, and that he is seized and possessed of certain real and personal estate, in the said inquisition specified; on motion of of counsel, and after hearing of counsel in opposition thereto, it is ordered that the finding of the jury, upon the execution of the said commission as set forth in the said inquisition, be, and the same is hereby confirmed; and it is on like motion ordered, that be, and he is hereby appointed, the committee of the person and estate of the said upon his filing with the clerk of this court, a bond with two sufficient sureties, to be approved by a justice (or judge) of this court, in the penalty of double the value of the property of the said as found by the said inquisition, conditioned for the faithful performance of his trust, according to the statute, and to account whenever required, in conformity with the rules and practice of this court. And it is further ordered, that upon filing such bond, a commission may be issued to such committee, under the seal of this court.

(In case a reference be ordered to determine upon the committee, then the special object of the reference should be stated, beginning at the word "ordered." The report of the referee, after reciting the manner in which he has discharged his duty, may then follow the form given after the word "hereby" and beginning with "appointed," and instead of the word "ordered" in the last sentence, the word "recommended" should be inserted.)

(No. 58.)

(Commission to the committee.)

The People of the State of New York, to all whom these presents shall come, GREETING:

Whereas, by a certain inquisition taken at , in , on the day of , by virtue of our commission,

in the nature of a writ *de lunatico inquirendo*, in that behalf duly made and issued, to inquire among other things, that the said _____, at the time of taking the said inquisition, was a lunatic, not having lucid intervals, (or an idiot,) so that he was incapable of the government of himself, or of the management of his lands, tenements, goods and chattels; (or an habitual drunkard,) as by the said inquisition remaining of record in our _____ Court may more fully appear; for the care and custody of whom, and for the management of whose estate it belongs to us, in our _____ Court, to provide. And whereas, sufficient security is given to us on behalf of the said _____ by _____ and _____, as is customary in such cases; Now, therefore, know ye, that we have given, granted and committed, and by these presents, do give, grant and commit, unto the said _____, the care and custody of the person, and the possession, care and management of the estate, as well real as personal, of the said _____, during our pleasure, to be signified under the seal of our _____ Court. And the said _____ and _____ are hereby required, within six months from the date of these presents, to return and file in the office of the clerk of our _____ Court, in the city and county of New York, a just and true inventory, under oath, of the whole real and personal estate of the said _____, stating the income and profits thereof, and the debts, credits and effects of the said _____, so far as the same shall have come to the knowledge of the said _____ and _____, or either of them, and that out of the said estate, or the rents, issues and profits thereof, they provide for the maintenance, sustenance and support of the said _____ and his family; and that annually thereafter, the said _____ and _____ file in the office of the said clerk, a similar inventory, and an account, under oath, of the management of the said trust, and of every other property or effects, belonging to the said estate, which they shall have since discovered, as required by the statutes and the rules of this court. And the said _____ and _____ are and each of them is further required to abide and obey all and every such order or orders in the premises as may hereafter be made in our said court, and to render a full and just account of the execution of the said trust, and of the estate, property and effects, which shall have come to their hands, or the hands of either of them, when and as often as required by our said court.

And you are hereby required to provide a suitable place of residence within the State of New York, for the said _____ with suitable attendants to take charge of him; also to visit him from time to time, at intervals not exceeding _____ month, and to see that he

is properly cared for in a manner suited to his means and social position.

Witness, Judge of, (or one of the justices of our Supreme)
Court day of
 [L. s.] Clerk.
 Attorney.
(Indorsed, " By the court.") Clerk.

(No. 59.)
(Petition for leave to traverse.)

Court.

In the matter of , an alleged Lunatic.	}	
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To the Court of

The petition of in the county of respectfully shows that on the day of last, by the report of an inquisition taken at in the county of before commissioners, appointed by virtue of a commission in the nature of a writ *de lunatico inquirendo*, issued out of and under the seal of the Court of dated on the day of and directed to the said commissioners to inquire, among other things, of the lunacy of your petitioner, upon the oaths of (*insert the names of the jurors*) good and lawful men of the said county, he was adjudged a lunatic and incapable of the government of himself, and of the management of his own affairs. And your petitioner further shows that jurors dissented from the inquisition so found, believing your petitioner to be of sound mind and memory.

And your petitioner further shows that since the return of such inquisition has been appointed, as your petitioner is informed and believes, committee of the person and estate of your petitioner, and acting in such capacity has taken upon himself the control of the whole real and personal estate of your petitioner, amounting in value to dollars.

And your petitioner further shows that he is of sound mind and capable of managing his own affairs, as will appear by the affidavits hereunto annexed, and which facts he can further establish by the testimony of many persons and the opinions of experts.

He therefore prays that an order may be granted, allowing your petitioner to traverse said inquisition, or that an issue may be awarded to try the fact of the lunacy of your petitioner and to inquire whether

he is incapable of managing himself or his affairs; and he also prays that there be allowed out of his estate a reasonable sum to defray the costs and expenses of trying such issue, as well as those of this application, and for such other or further relief as to the court may seem meet.

Attorney for Plaintiff.

Attorney for Petitioner.

Verification.

STATE OF NEW YORK, }
COUNTY OF } ss:

On this day of before me personally appeared the above-named , and made oath that he had read (*or heard read*) the above petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to be on his information and belief, and that as to those matters he believes it to be true. And I further certify that I have examined the said with reference to his mental capacity and ability to understand the nature and object of the above petition so subscribed by him, and find that he is apparently of sound mind and capable of understanding the same.

(No. 60.)

(Petition for sale or mortgage of lunatic's estate.)

(Title.)

To the Court of the State of New York :

The petition of , the committee of the person and estate of the above-named (*lunatic or idiot or habitual drunkard*), respectfully shows that by an order of this court, made on the day of , your petitioner was appointed such committee. That as such committee, he has duly made out and verified an inventory of the estate of the said , both real and personal, and has therein stated the value thereof, and the amount of the rents and profits of the said real estate, and of the debts owing by the said lunatic (*idiot or habitual drunkard*), a copy of which inventory is hereto annexed. That it appears from the said inventory, that the said real estate consists of several lots in the ; (*here describe premises*), that the annual rent of the improved real estate is not far from dollars, that the unimproved

property is not increasing in value, but is a tax upon the estate, on account of the various taxes and assessments levied upon the same to improve the near to (*or adjoining*) said property. That the value of the personal estate is about dollars, and consists of (*describe the same*), as specified in said inventory.

And your petitioner further shows that the following is a schedule of the debts and demands now existing against the estate of the said , with their respective amounts; and that the aggregate amount of such debts and demands is about , for the payment of which, in addition to the necessary cost of supporting such lunatic, the income of his whole estate, both real and personal, is wholly insufficient.

Your petitioner therefore prays that an order of this court may be made, allowing him to mortgage (*or sell*) so much of the real property of the said as may be necessary for the payment of his debts.

(Add verification and affidavits showing value of real property.)

(No. 61.)

(Order authorizing committee to contract for sale.)

(Same title as before.)

On reading and filing the petition of , the committee of the above , dated , and praying for authority to mortgage or sell so much of the real property of the said as may be necessary for the payment of his debts, and it appearing from the said petition and affidavits annexed thereto, that the personal property is safely invested, but that a portion of the real property of said is wholly unproductive, and a tax upon the general estate; that there are debts owing by the said , which amount in the aggregate to the sum of dollars, and that a sale of a portion of the real property of said , is both necessary as well as advantageous for the payment of such debts; it is ordered that the said , as the committee of the said be, and he is hereby authorized and directed to sell at public or private sale, subject to the approval of this court, the (*improved or unimproved*) property hereinafter described, to wit:

for the purpose of discharging the outstanding debts of the said .

And that before any contract or deed shall be executed, the terms of such sale (*or conveyance*) shall be reported by the said committee under oath to this court.

(No. 62.)

(Report of sale by committee.)

(Same title as before.)

To the Court of

In pursuance of an order of this court made in the above matter on the day of , authorizing and directing the undersigned to sell at public or private sale, subject to the approval of this court, the parcel of real estate therein specified for the purpose of discharging the outstanding debts of the said , and directing the undersigned to report the terms of such sale or conveyance to this court before any contract or conveyance should be executed.

I, the subscriber, the committee of the said , do respectfully report, that I have entered into an agreement, subject to the approval of this court, with , for the sale and conveyance to him (*or them*) of the parcel of land known and described as follows, to wit :

at and for the sum of dollars, to be paid in the manner following, that is to say, dollars on the delivery of the deed, and the remainder, amounting to dollars to be paid at the expiration of years from the day of the delivery of such deed, the same to be secured by a bond of the said , and a further mortgage upon the property so sold to him as a collateral security to such bond, with interest thereon to be paid semi-annually on the days of and respectively. And I do further report that the sum of , representing the entire purchase-money for the said parcel of land, was the highest sum offered by any one for the same.

Committee.

Dated
(*Add verification.*)

(No. 63.)

(Order confirming sale, and directing the execution of conveyance.)

At, etc.

(Title.)

On reading and filing the report of , the committee of the person and estate of the said , made

upon oath and dated the day of , stating that in pursuance of an order of this court dated , he had entered into an agreement subject to the approval of this court, with , for the sale to him of the parcels of land therein mentioned belonging to the said , for the sum mentioned in the said report, a large portion of the purchase-money remaining payable on the delivery of the deed therefor : on motion of , attorney for the said committee, it is ordered that the said report and the agreement therein mentioned be and the same are hereby ratified and confirmed. And it is further ordered that the said committee do execute, acknowledge and deliver to the said purchaser, a good and sufficient conveyance of the tract or lot of land so purchased by him, upon receiving therefor the purchase-money agreed to be paid. And that the committee apply the net proceeds of the said sale, after deducting the costs of the proceedings in this matter to be taxed, and the other necessary expenses of effecting the said sale, to the payment and discharge of the debts of the said , which are specified in the petition of the said committee, on their application hereinbefore, for leave to mortgage or sell a portion of said real estate.

(No. 64.)

(*Petition by lunatic or habitual drunkard to supersede the commission on his recovery.*)

(Title.)

To the Court of the of
The petition of the above , respectfully shows, that on the day of , a commission in the nature of a writ *de lunatico inquirendo* was issued out of this court against your petitioner ; and on the day of , an inquisition was taken under the same, whereby your petitioner was duly found a lunatic (*or habitual drunkard*), and one , the of your petitioner, was subsequently appointed by this court committee of his person and estate.

And your petitioner further shows that he is now of sound mind and understanding and has been so for several months, and believes that said commission of lunacy should now be superseded, because unnecessary, as appears by the affidavits hereto annexed, and that the costs of suing out the said commission of lunacy, and also the costs of the committee, may be examined and allowed.

Your petitioner therefore prays, that he may be at liberty to attend in open court, or before suitable referees duly appointed, for the purpose of being examined as to his sanity of mind and competency of understanding, for the management of his person and estate; and that the said commission, inquisition and proceedings therein, may be superseded forthwith; and that a supersedeas may issue for that purpose; or for such further or other order in the premises as to this court shall seem meet.

Dated

(Add jurat and affidavits in support of the petition.)

(No. 65.)

(Order to supersede commission.)

At, etc.

(Title.)

On reading and filing the petition of the above _____, dated the _____ day of _____, setting forth that he has perfectly recovered his mental sanity and understanding, and has enjoyed the same for now _____ months past, and praying that the commission, inquisition and proceedings in the above matter made, be superseded; and on reading and filing the affidavits annexed to said petition, and in support thereof, and upon examining said _____, in open court *(or upon reading the report of the referees duly appointed by an order of this court, to examine and determine in regard to the recovery of the said _____)*, as to his sanity of mind, and competency of understanding: and on motion of _____, attorney for the said _____, it is ordered that the commission of lunacy issued against the said _____, and the inquisition taken thereon be forthwith superseded and determined.

(No. 66.)

(Supersedeas of a commission of lunacy.)

The People of the State of New York, to all to whom these presents shall come, GREETING:

Whereas, by a certain inquisition, taken at _____, in the county of _____, on the _____ day of _____, by virtue of a commission, in the nature of a writ *de lunatico inquirendo*, in that behalf duly made and issued to inquire, amongst other things, of the lunacy *(or habitual drunkenness)*, of _____, it was found, among other things, that the said _____ was, at the time of taking the said inquisition, a lunatic *(or habitual drunkard)*, and did not enjoy lucid intervals, so that he was not capable of

the government of himself, or of the management of his lands and tenements, goods and chattels, as by the said inquisition, remaining on record, will more fully appear. And whereas, by our commission, issued out of and under the seal of our said Court, bearing date the day of , sufficient security having been given for the said by , as is customary in such cases, we did give, grant and commit unto the said

the care and custody of the person, and the possession, care and management of the estate, as well real as personal, of the said , during our pleasure, to be signified in our

court, as by the said commission, remaining as of record, will, among other things, more fully appear. But because, upon full examination in our court, before us had in this behalf, it sufficiently appears to us that the said has recovered of his lunacy (*or habitual drunkenness*) aforesaid, and is restored to his right mind, memory and understanding, so that he is capable of governing himself, and of managing his lands, tenements, goods and chattels; and we in this behalf being willing that what is just and right be done to the said : Know ye, therefore, that we, for and in consideration that the said , is not now a lunatic (*or habitual drunkard*), but of sound mind, sane memory and understanding, have superseded and determined, and by these presents do supersede and determine the aforesaid commission, in the nature of a writ *de lunatico inquirendo*, and all process thereupon made, and also the commission to the said , and all and singular the grants and powers in the said commission specified and contained, to all intents and purposes whatsoever; and all and singular the same we annul and make void by these presents; and also the aforesaid from the care, custody and government of the person of the said ; and from the possession, care and management of the estate, as well real as personal, of the said

 , we fully discharge by these presents; requiring that the said shall by no means suffer any person or persons to intermeddle touching the said or his estate for the future. And the said to the control and government of himself, and of his property we fully restore by these presents.

Witness, , Judge, or (*one of the Justices of*) our Court, at , this day of , one thousand eight

[L. S.]

Attorney.

Clerk.

Indorsed "By the court."

Clerk.

(No. 67.)

(Petition for order directing payment of claim against a lunatic.)

In Court of

In the matter of the petition of

To the Court of

The petition of of respectfully shows that of is justly indebted to your petitioner in the sum of dollars, with interest thereon from the day of , for sundry goods, wares and merchandise furnished to him at his own request, from the day of to the day of , and which account of goods so furnished as aforesaid is hereby annexed, marked Schedule A. That the items in said account mentioned are correct in all respects; that they were delivered at the times mentioned therein, and that no part of the indebtedness of the aforesaid has been paid or satisfied, except *(mention what, if any)*

And your petitioner further shows that, as he is informed and believes, the said was declared a lunatic *(or habitual drunkard)* by the court, on the day of , and that residing at in said county, is now the committee of his person and estate, and that he has been acting in such capacity for the space of months past.

And your petitioner further shows that he has, at various times, presented *(or caused to be presented)* the said account to the said committee, asking payment of the same, and that said committee has declined, and continues to decline to pay the same or any part thereof, and the sum of dollars, with interest as aforesaid, is now justly due thereon to your petitioner.

Wherefore your petitioner prays that an order may be entered by this honorable court requiring said committee to pay your petitioner the amount so due him as aforesaid, to wit, the sum of dollars and cents with interest thereon from the day of , 18 , or that it may be referred to some referee to pass upon the said accounts, or that your petitioner may have leave to bring an action against the said committee to establish and adjust the said account and the amount due him upon the same.

*Attorney for petitioner.**(Verification in the usual form.)*

(No. 68.)

(Notice of motion to enforce payment of claim.)

(Same title.)

Sir: Take notice that I shall apply at the next Special Term of the Court, to be held at in the county of on the day of at the opening of the court on that day or as soon thereafter as counsel can be heard, for an order that the prayer of the petition hereunto annexed be granted with costs to be paid out of the estate of , lunatic, whose committee you are, or for such other or further order as the court may grant; which motion will be founded upon the petition with a copy of which you are herewith served.

Dated

Yours, etc.,

*Attorney for petitioner.*To committee of , a lunatic (*or habitual drunkard*).

(No. 69.)

(Order directing how payment of claim against lunatic may be enforced.)

(Title as before.)

At a special term of the Court of .

On reading and filing the petition of , dated , praying for an order requiring , as committee of the person and estate of , a (*lunatic or habitual drunkard*) to pay the accounts and demands recited in said petition, and after hearing , of counsel for the petitioner, and , of counsel for the said committee, it is hereby ordered that the said committee of the estate of the above-named pay to the said petitioner, or his counsel, within from the date of the service of a copy of this order upon him, the amount of the said petitioner's claims as recited in his said petition, and which claims are here adjusted at the sum of dollars and interest thereon from the day of , 18 . And it is further ordered that the committee aforesaid pay to the counsel for the said petitioner dollars as his lawful costs upon said application.

(No. 70.)

(Same order directing a reference.)

(Title as before.)

At a special term of the Court of .

On reading and filing the petition of (same phraseology as in above down to the word "ordered") that it be referred to of in the county of to pass upon and adjust the several claims and demands of the said petitioner as recited in his said petition, and to determine the amount justly due him thereon, and that the said referee make his report to this court at the earliest possible moment.

(No. 71.)

(Same order permitting action against committee.)

(Title as before.)

At a special term of the Court of .

On reading and filing the petition of (same phraseology as in No. 69 down to the word "ordered") that the said have leave to bring an action in the Court against the committee of said lunatic, with intent to establish and adjust the claims and demands set forth in said petition, and what amount, if any, is due thereon to the said petitioner. And that the said petitioner have leave, in his discretion, to join the said lunatic as a party defendant in said action.

It seems needless to multiply at any greater length the varieties of forms which the differing circumstances of lunatics' estates may require. All these forms are cast in about the same mould, and become repetitious without utility when special subdivisions of them are drafted to meet individual cases. With the knowledge of what the law demands in each instance, it cannot be difficult for any lawyer to so alter or vary the typical forms hereinbefore given as to make them meet every shade of necessity which can arise. Hence we have omitted, as not indispensable, forms of *Inventories*, *Petition for sale of realty to*

pay the debts of a lunatic, Orders of reference thereon, Referees' Reports and Reports of Sales by Committees and their Deeds, which differ in nothing from similar proceedings in the case of *Infants*. In the early Chancery Practice of this State it was thought necessary to have a separate form for every paper or proceeding emanating from that court. With the simplification of all forms of procedure under the Code, it is found that many forms can now be grouped in a class. This is particularly the case in lunacy proceedings where a few salient facts furnish the substantive matters to be presented to the judgment of a court of equity.

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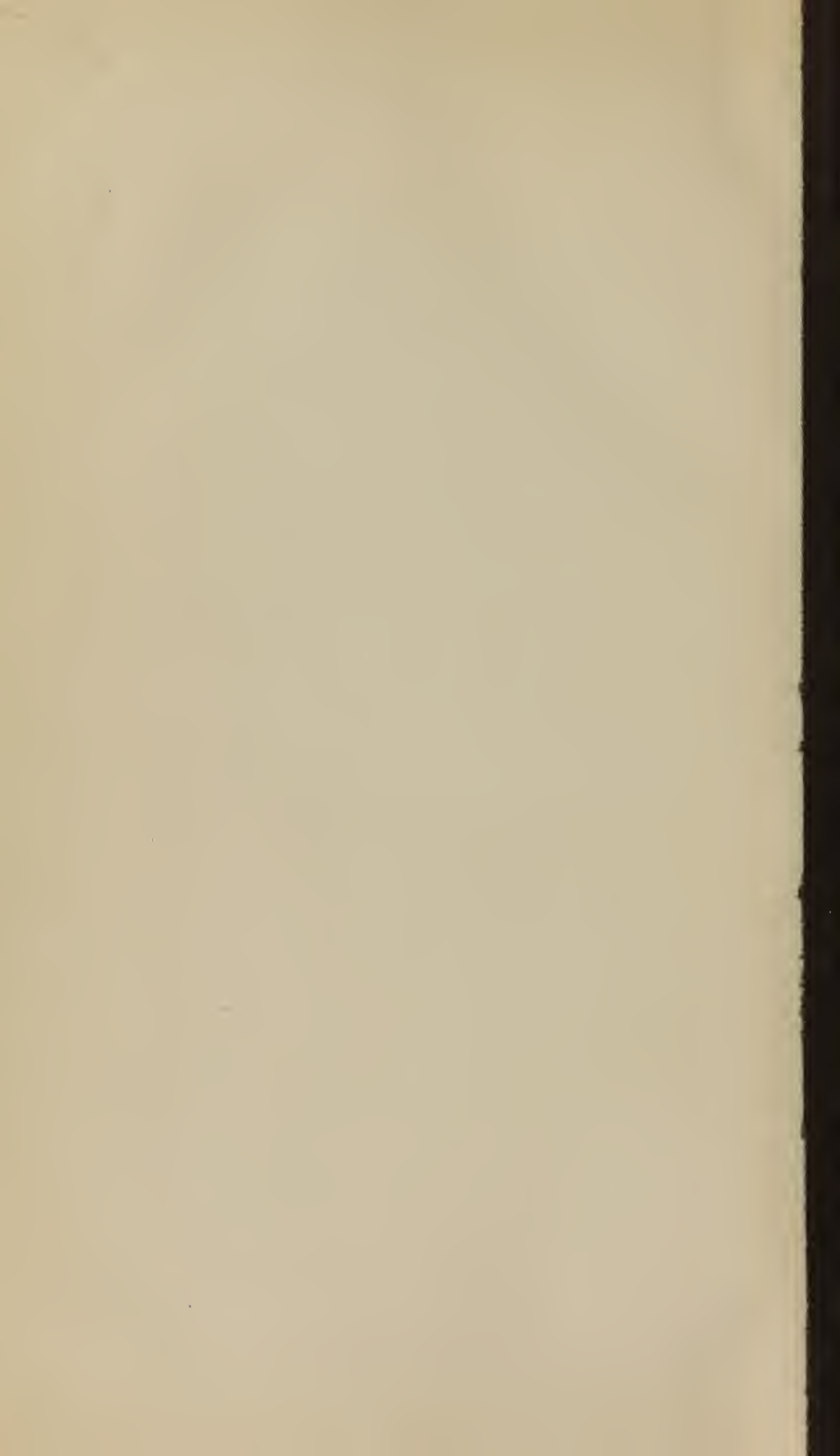
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